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HERITAGE CONSERVATION - THE BUILT ENVIRONMENT

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HERITAGE CONSERVATION - THE BUILT ENVIRONMENT

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PREFACE

The Land Use Policy and Research Branch of the Lands Directorate initiated a new series of studies on land planning techniques in Canada in 1983. These nation-wide studies focus on land planning related to specific land use problems or issues. Such national overviews have the advantage of providing a state-of-the-art of Canadian practices to inform both practitioners and the interested public.

This study provides a national overview of planning for the built heritage environment as it is structured throughout Canada. It begins with a brief overview of the international context and definition of heritage legislation followed by a description of federal government activities in the field of man made heritage preservation. The major programs of the non government Heritage Canada Foundation are outlined.

The majority of the report is an overview of heritage legislation, policies and programs for each province and territory. Three levels of administration are discussed - provincial, municipal and private. The major purpose of the report is to present various mechanisms utilized by the provinces/territories to preserve the built environment. A subsequent report in this series will discuss preservation techniques applied to Canada's natural heritage lands.

TABLE OF CONTENTS

PAGE

Preface iii

Chapter 1 Introduction 1

2 Federal Level 3

3 Provincial/Territorial, Municipal and Private Levels 8

4 Alberta 20

5 British Columbia 30

6 Manitoba 42

7 New Brunswick 55

8 Newfoundland and Labrador 63

9 Northwest Territories 72

10 Nova Scotia 78

11 Ontario 86

12 Prince Edward Island 106

13 Quebec 114

14 Saskatchewan 126

15 Yukon Territory 136

Conclusion 140

Selected Bibliography 141

Appendix A - Policy on Federal Heritage Buildings 144

Appendix B - Quebec Cultural Property Act 146

Appendix C - Selected Federal-Provincial-Territorial Government Agencies 151

CHAPTER ONE

INTRODUCTION

Land is generally valued primarily for what it can be used for, and for where it is. The special lands and structures thereon which are the subject of this report are valued more for what they were. Canada's architectural heritage, which by world standards is quite young, is nonetheless important to Canada and Canadians. Methods through which we ensure its preservation as part of the heritage we pass on to future generations is thus a land use and planning question of importance today. This report examines, in some detail, the mechanisms currently in place which contribute to the preservation of the built environment in the various Canadian jurisdictions.

For the purpose of this report, the definition of the built environment is adapted from that of the United Nations Educational, Scientific and Cultural Organization (UNESCO). Thus: **historic and architectural areas are any groups of buildings, structures and associated open spaces constituting human settlements in an urban or rural environment, which have recognized architectural, historic, aesthetic or socio-cultural values. These areas are varied in nature and include, but are not restricted to, historic towns, old urban quarters, villages and hamlets.**

Heritage legislation, which is a major focus of this report, is defined, by international consensus, as **the body of law which deals with the identification and protection of sites and areas of historic and/or architectural interest.** Financial aid to such sites and areas can also be considered a component of such legislation, although it is not usually described in the statutes themselves.

In July 1976, Canada officially become a signatory to the UNESCO World Heritage Convention, drafted in 1972. The Convention states that signatories are **formally committed to heritage protection within and beyond their boundaries.** In legal terms, under the World Heritage Convention, the federal government is legally bound to respect heritage sites on foreign soil. Ironically, there is no such legal obligation or statute requiring the federal government to respect heritage sites on Canadian soil.

At the federal level, the **Historic Sites and Monuments Act** (1953) does not protect designated historic sites against demolition since such designations have no legal effect. Also, the federal government is under no legal obligation to protect heritage buildings it owns and federal property is exempt from provincial legislation which protects other land. The federal **Income Tax Act** (1952) treats demolished investment property as "lost" and thus provides substantial tax deductions on demolition or destruction of the heritage value. Furthermore, there are no income tax incentives for renovation, and renovated buildings are in poorer tax positions than new construction (see Chapter Two).

At the provincial level, 11 of Canada's 12 provinces and territories (excluding Ontario) have enacted special statutes to protect heritage sites from demolition and/or unsympathetic construction. A chapter is devoted to each province and territory.

Municipalities legally protect heritage through local land use legislation and land use procedures applied to sites and districts. Such legislation and procedures are discussed for each province and territory. At the private level, agreements to restrict alteration or demolition are discussed related to easements and restrictive covenants.

In this report, a brief international overview is followed by a more detailed outline of federal heritage activities. The Heritage Canada Foundation is discussed as a special case. A selected list of federal, provincial and territorial government agencies is provided as an appendix.

CHAPTER TWO

FEDERAL LEVEL

This chapter is a review of federal heritage-related activities. Topics discussed are the **Historic Sites and Monuments Act**; federal activities under this Act including the duties of the Historic Sites and Monuments Board of Canada; the Policy on Federal Heritage Buildings; and demolition of federally-regulated property. This is followed by a brief discussion of federal fiscal aspects under the **Income Tax Act** as related to demolition and renovation.

1. Federal Legislation

Most constitutional authority for the protection of heritage land and buildings within provincial boundaries belongs to the provinces. The main federal responsibility for heritage sites rests with the Department of the Environment (Parks Canada), through the **Historic Sites and Monuments Act** which can be applied to almost any property in Canada but does not protect buildings (including federal buildings) against demolition. Therefore, although the federal government can name national historic sites, it cannot protect these properties and such designations have no legal effect. In the absence of direct statutory controls of federally owned heritage property, the question has arisen whether such property could be subjected to provincial heritage laws. Most authorities contend that federal property is constitutionally exempt from such provincial legislation.

The federal government, through various administrative authorities, has established special non-statutory administrative procedures to minimize the effect of federal public works which may damage heritage. As well, some property, although not federally owned, is under direct federal control, such as railway property and harbours. Federal agencies supervise this property, but it is not clear whether these agencies can protect heritage. Although it was often assumed that such property shared the same immunity from provincial laws, including heritage laws, as federal property, that assumption was modified by a 1979 litigation which decided that such property can probably be subjected to provincial and municipal heritage controls.* Finally, the federal government exercises direct jurisdiction over several legislative protective measures in the Territories. These are discussed in the chapters on the Northwest Territories and Yukon Territory.

2. Federal Heritage Activities

These activities are conducted under the **Historic Sites and Monuments Act**. Since all matters pertaining primarily to property and civil rights are of exclusive provincial jurisdication, the federal government cannot protect historic sites and such designations would have no legal force. The federal government can, however, purchase the historic sites, and has purchased approximately 100 such sites, the majority being museums.

In matters pertaining to historic sites, the Minister of the Environment consults an advisory body named the Historic Sites and Monuments Board of Canada. This 17 member Board has two representatives from each of Ontario and Quebec and one each from the other provinces and two territories, the Dominion Archivist, an officer of the National Museums and an officer of Environment Canada. The Board advises the Minister on matters of national historic and architectural significance. It first screens out applications which are beyond its terms of reference (e.g., cemeteries) and, after study, makes a recommendation to the Minister. The study period is usually six months.

The Board may recommend that the Minister ignore the structure, designate the structure as a national historic site and erect a plaque, enter into a cost-sharing agreement, or acquire the property. The Minister is not bound by such recommendations.

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* Hamilton Harbour Commissioners v. City of Hamilton (1978), 1 M.P.L.R. 133 (Ont.S.C.), on which this view is based, was appealed unsuccessfully to the Ontario Court of Appeal: (1979) 21 O.R. (2d) 459. Appeal to the Supreme Court of Canada was abandoned.

Specifically related to historic buildings is the computerized Canadian Inventory of Historic Building (CIHB) established in 1970 as an information tool for the Board. The CIHB system permits the listing of federal, provincial and municipal heritage buildings, as designated by these authorities, plus more detailed listings of the heritage status and ownership of federally-owned buildings. The inventory is administered by the Minister of the Environment and consists of a listing of approximately 190 000 buildings built before 1914. There is no evaluation of heritage quality of buildings and the inventory of a building in the CIHB gives it no protection. It only recognizes that a structure was built before a certain date.

In 1982, the federal government adopted the Policy on Federal Heritage Buildings which is implemented by Parks Canada. The Federal Heritage Buildings Review Office (FHBRO) is an interdepartmental advisory group responsible for the evaluation of federal buildings 40 years old or more and for assessing any signficant intervention (proposed modifications to heritage buildings) provided by the owners of designated federal heritage buildings. Appendix A providdes the main points of the Policy and the general provisions which govern federal departments and agencies (not Crown Corporations).

3. Demolition of Federally-Regulated Property

There is little the federal government can do directly, under the Constitution, to save threatened buildings, except to buy them. Regarding heritage conservation, the federal government has no legal duty. A subsidiary problem is destruction of heritage on land which, although not federally-owned, is federally-controlled. Such land is beyond the applicability of provincial statues, including heritage statutes. The primary example of such land is railway property. Various agencies regulate the use of such properties but have not used their powers for heritage conservation. Consequently, there is little control in practice upon the destruction of heritage on those properties. A discussion of railway station preservation is contained in Canadian Heritage magazine, August/September, 1985.

Some 45 federal departments and agencies affect cultural property directly or indirectly. An interdepartmental Heritage Buildings Conservation Committee supervises and discusses ways of minimizing the damage which public works projects may cause to cultural property. If a site has been declared by a province to be a protected landmark, the federal government, unlike any other party, is under no legal obligation to respect that declaration if it is carrying out a federal public works project. Consequently, if a site of heritage significance, designated or not, is threatened by a federal project or is on federal land, the only recourse is to apply for help through the Minister of the Environment and the Historic Sites and Monuments Board of Canada.

4. Federal Fiscal Aspects

Following are federal incentives and disincentives to heritage property maintenance.

A. Demolition

Any calculation of the economic advantages and disadvantages of conservation as opposed to demolition of heritage buildings must take the **Income Tax Act** into account: the effect of that statute can outweigh all the federal and provincial subsidy programs put together.

A powerful incentive for demolition is rooted in the relatively obscure definition sections of the Act. Those sections explain the meaning of a transaction whereby a taxpayer "disposes" of a property; however, demolition is not included among "dispositions" of property. This is the only case in which a person can dispose of a property (i.e., a building) according to common English language definition without having "disposed" of it according to the Act; instead, the wording of the definition sections leads the Act to treat demolished property as if it had been "lost". This unique terminology has two effects. It first affects owners who have been deducting depreciation on buildings from their taxable income - even when the building has decreased very little in value. Under normal circumstances, this over-depreciation would become obvious when the owner sold the building, and

Revenue Canada would force the excess deductions back into taxable income; this is called "recapture" of the depreciation. This possibility is avoided by demolition, and so the overdepreciation goes unchallenged. The second effect is more direct: since the building is "lost", this "terminal loss" (valued at the entire book value of the building) is entirely deductible from the owner's taxable income. If the building had a book value of $100 000 when demolished, the owner can claim a deduction of $100 000 which he can conceivably spread over seven years to render other income tax-free.

B. Renovation

The **Income Tax Act** contains no specific incentives for renovation; in contrast to the incentives granted to new construction. This compounds the fiscally uncompetitive position of renovation vis-a-vis demolition and redevelopment. There are, however, certain arguments of a purely tax nature which support a more favourable tax treatment of renovation.

For tax purposes, work on a revenue-producing building can fall into one of two categories: expenditures made "once and for all", and those made for a limited time only. Expenditures made "once and for all" are called capital expenditures, and are not tax-deductible; expenditures made for a limited time (e.g. maintenance, regular replacement of warn-out parts, etc.) are called "business expenditures", and are entirely tax deductible. Renovations are usually treated as a capital expense and are not tax decuctible, even for buildings governmentally designated as heritage sites. Obviously, the proprietor is in a more favourable tax position if the work on a building can be treated as a business expense.

The legislative intent of various provincial heritage statutes is clearly to promote the retention of certain specific heritage buildings indefinitely: in that context, no expenditure on such buildings can be legally treated as being reliably made "once and for all". Consequenty, the approach taken by Revenue Canada to renovation expenses differs from the intent of the provincial heritage statutes.

CHAPTER THREE

PROVINCIAL/TERRITORIAL, MUNICIPAL AND PRIVATE LEVELS

This chapter provides general overviews of provincial/territorial and municipal legislation and private level legal protection. Tables 1 and 2 illustrate provincial/territorial and municipal heritage legislation, respectively. A more in-depth discussion appears in subsequent chapters for each province and territory outlining heritage legislation and programs at three levels - provincial/territorial, municipal and private. This chapter also includes a discussion of the Heritage Canada Foundation.

1. PROVINCIAL/TERRITORIAL LEGISLATION - OVERVIEW

A. Sites

Protection of the built environment is discussed related to sites, surroundings, groups and districts, designation procedures and designated buildings.

Eleven of Canada's 12 provincial/territorial governments are empowered to protect heritage sites from demolition and/or unsympathetic construction. The only exception is Ontario.

The relevant provincial statutes are as follows:

Alberta:	**Historical Resources Act**
British Columbia:	**Heritage Conservation Act**
Manitoba:	**Heritage Sites and Objects Act**
New Brunswick:	**Historic Sites Protection Act**
Newfoundland and Labrador:	**Historic Objects, Sites and Records Act**
Northwest Territories:	**Area Development Ordinance**

TABLE 1

PROVINCIAL AND TERRITORIAL HERITAGE LEGISLATION (July, 1985)

	Recommended by UNESCO	Newfoundland	Prince Edward Island	Nova Scotia	New Brunswick	Quebec	Ontario	Manitoba	Saskatchewan	Alberta	British Columbia	Northwest Territories	Yukon
Are clear criteria given for the definition of Heritage Property?	Not discussed	No	No	No	No	No	No	No	Yes	No	No	No	No
Must notice be given of impending demolition of unregistered Heritage Property?	Not discussed	No	No	No	No	No	No	No	No	No	No	No	No
Is Government under any obligation to attempt to protect unregistered Heritage Property?	Yes	No	No	No	No	No	Archaeological sites only	No	Archaeological sites only	Archaeological sites only	Indian Archaeological sites only	No	No
Can demolition of an unclassified building be delayed pending study?	Yes	No	No	Yes	No	Yes	Yes	Yes[3]	Yes	Yes	Yes	Yes	No
Can definitive protection against demolition be given to a building (short of expropriation)?	Yes	Yes	Yes	Yes	Yes	Yes	Archaeological sites only	No Not perm. protection	Yes	Yes	Yes	Yes	Probably
Is radius around monument protected?	Yes	No	No	No	No	Yes	No	No	No	No	No[1]	No	No
Can government decisions on designation be appealed to higher authority by statute?	Yes	No	No	No	No	No	No	No	No	No	No	No	No
Is the definitive preservation of districts specifically foreseen?	Yes	Yes	Yes "Areas"	No	Yes[1]	Yes	No	Yes[1]	Yes	Yes[1]	Yes[1]	Unclear	Probably
Can maintenance of Heritage Property be enforced?	Yes	No	Yes	No	No	Yes	No	Yes At gov't expense	Yes	Yes	No	No	No
Can Heritage Sites be inspected?	Yes	Yes[2]	No	No	No	Yes	Yes	Yes[4]	Yes	Yes	Yes	No	No
Does government have right of first refusal on sale of Heritage Buildings?	Not discussed	No	No	No	No	Yes	No	No	Yes	Yes	No	No	No
Can Heritage Properties be exempted from building codes?	Yes	No	No	No	No	No	No	No	No	Yes	Yes	No	No
Can illegally altered Heritage Buildings be restored at owner's expense?	Yes	Yes	No	Yes	No	Yes	Yes	Gov't subsidized buildings only	Yes	Yes	Yes	No	Yes
What is the maximum penalty for offences?	Not specified	$1000 plus 3 months	$1000	$10000 indiv. plus up to 1 year or both $100000 corps.	$100 plus 30 days	$25000	$10000 plus 1 year (indiv.) $50000 for corps.	$100[3]	$5000 plus 6 months indiv. $250000 corps.	$50000 plus 1 year plus damages	$2000 plus 6 months	$200 under Area Devel. Ordin. Max. fine $500 plus up to 6 months	$200

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[1] The law empowers protection of "sites", which can be as large as a district.

[2] Provision for Regulations established but not Regulations themselves.

[3] Under Planning Act, max. fine of $1000 for indiv. and $5000 for corps. plus possibly up to 6 mos. imprisonment.

[4] During authorized alterations.

Source: Update of Protecting the Built Environment (1982)

TABLE 2

MUNICIPAL HERITAGE LEGISLATION (July, 1985)

	Newfoundland		Prince Edward Island		Nova Scotia	New Brunswick	Quebec	Ontario	Manitoba		Saskatchewan	Alberta	British Columbia	Northwest Territories	Yukon
	St. John's	Elsewhere	Charlottetown						Winnipeg	Elsewhere					
Is heritage conservation an obligatory part of municipal planning?	No	No	No	No	No	No But may be compelled	No	No	Yes	Yes	No	No	No	No	No
Is municipality obliged to file environmental impact assessment on demolition of heritage?	No	No	No	No	No	No	No	Probably	No	No	Yes	Yes	No	No	No
Can municipality give permanent protection to buildings?	Yes	Yes	Yes	No	No	Yes	No	No	Yes	Yes	Yes	Yes	Yes	Yes	No
Can municipality give temporary protection to buildings?	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Can municipality regulate															
Bulk and Height	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Design	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes*	Yes**	No	Yes	No²	Yes	Yes
Use	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Set-back	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Signs?	Yes	Yes	Unclear	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Can municipality accept or reject applications for construction on heritage sites on a discretionary basis?	Yes	Yes	Probably	No	No	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Probably	No
Can municipality enforce maintenance															
of dwelling interiors	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No⁴	Yes	Yes
of dwelling exteriors	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No⁴	Yes	Yes
of non-residential interiors	Yes	Yes	Unclear	Yes	Yes	Probably	Yes¹	Yes	No	No	Yes	Yes	No⁴	Yes	Yes
of non-residential exteriors?	No	Yes	Yes	Yes	Yes	Probably	Yes¹	Yes	No	No	Yes	Yes	No⁴	Yes	Yes
Can municipality compel protection of trees	Yes	Yes	Unclear	Unclear	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	No
landscaping?	No	No	No	No	Yes	Yes	Yes³	No²	No	No	No	No	No²	No	No
Can illegally altered buildings be restored at owner's expense?	Yes	Yes	No	No	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Usual maximum penalty for offences.	$100	$100 - 200	$90 + 90 days $1000 for subsequent offences	$500 + 90 days	$100	$100 per day + imprisonment on default of payment	Depends on city	$10000 for indiv. and $50000 for corps. under Heritage Act plus 1 year $1000 Planning and Municipal Acts.	$1000 + 6 mos. for indiv. $5000 for corps.	$1000 + 6 mos. for indiv. $5000 for corps.	$1000 + 6 mos.	$500	$2000 + 6 mos.	$500 + additional fine of $100/day for continuing offences	$500 + 6 mos.

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[1] Except in municipalities regulated by the Cities and Towns Act.

[2] Except under development control schemes.

[3] Except in Montreal, Quebec and rural municipalities.

[4] Except for health, safety or "public nuisance" violations.

* Non-residential buildings and apt. blocks

** Unclear

Source: Update of Protecting the Built Environment (1982)

Nova Scotia:	**Heritage Property Act**
Prince Edward Island:	**Recreation Development Act**
Quebec:	**Cultural Property Act**
Saskatchewan:	**Heritage Property Act; Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act**
Yukon Territory:	**Area Development Ordinance**

In Ontario, the province protects only archaeological sites. Other historic sites can only be protected by municipalities.

B. Surroundings

The only province to protect the surroundings of designated sites is Quebec under the **Cultural Property Act**. The distance is a radius of 150 metres (500 feet). In Alberta, any projects within 0.8 km (½ mile) of a designated site must, according to regulations passed under its **Planning Act**, be submitted for comment to the Cultural Affairs officials of that province; but their decision is not legally binding.

C. Groups and Districts

Only one provincial statute refers specifically to the provincial protection of districts. The Quebec **Cultural Property Act** empowers the Minister to declare protected districts.

The New Brunswick Minister of Education can also designate historic districts, but the designation has no legal effect.

The statutes of other provinces do not refer specifically to districts, instead, they usually refer to sites. A site can be as large or as small as the government declares it to be. An entire district can be considered a single site for legal purposes. For example, Gastown and Chinatown in Vancouver and Bitumont in Alberta are considered multi ownership sites.

D. Designation Procedures

The procedure for designation usually comprises a number of steps, not all of which are described in legislation; some are described in Regulations, and others are simply carried out in practice without any formal legal requirement. They apply more or less to all provinces except Nova Scotia and Ontario.

Most provinces have historical boards which advise respective governments regarding structures worthy of protection; but only in Alberta and Quebec is it obligatory for the government to consult with these boards.

The owner of a property proposed for protection is frequently notified beforehand of this possibility; this is a legal requirement in both Alberta and Quebec, where such notice must be given 60 days before designation. Such notice must include the reasons for the proposed designation.

Once the property has been designated for protection, it is customary to register this fact at the land titles office. This is a legal requirement in Alberta. Prince Edward Island adds that the designation must be announced in a local newspaper and be posted on a sign on the property.

No provincial statute outlines an elaborate procedure for applications to conduct alterations or demolition on provincially designated sites. There are very few designated buildings in Canada, and even fewer applications to change them; consequently, this activity is usually treated in an ad hoc manner.

E. Designated Buildings

Increasing attention is being paid to the idea of permitting either the province or municipalities to designate buildings for protection. This is the case in Alberta, British Columbia and New Brunswick. Buildings in the capital cities of Manitoba (Winnipeg), Newfoundland (St. John's) and Prince Edward Island (Charlottetown) are also protected through granted provincial powers.

2. LOCAL LEGISLATION

A. Sites

Municipalities protect heritage through a variety of legal means applied to sites and districts. A discussion follows on local land use legislation and local land use procedures.

There are three kinds of legislation which confer power on Canadian municipalities for heritage purposes. The first is enabling legislation which delegates heritage functions to all muncipalities in a given province. The second confers powers on only certain specified municipalities. The third is customary planning legislation which can be adapted for the protection of heritage property.

Five provinces empower all their municipalities to give some protection to cultural sites.

The British Columbia **Heritage Conservation Act** authorizes municipalities in that province to list properties which will enjoy permanent protection. As mentioned previously, the provincial government is also empowered to grant such protection; protection may therefore come from either the province or the municipality.

The New Brunswick **Heritage Preservation Act** similarly empowers municipalities to grant permanent protection against alteration and demolition to buildings and areas. Such municipalitie's initiatatives must, however, be ratified by the provincial Cabinet. Like British Columbia, this can be called a two-tiered system of protection.

Alberta has introduced a similar system to New Brunswick, however, no provincial authorization is needed for municipal designations.

Ontario, as previously stated, protects only archaeological ruins. Any other kind of historic site can only be protected by municipalities. Furthermore, the protection granted by a municipality to a threatened structure is for 270 days; after the period expires, the building can be demolished unless the structure is purchased. The relevant law is the **Ontario Heritage Act**.

A similar power to postpone demolition, in this case for one year, is vested in Quebec municipalities under the **Cities and Towns Act**.

B. District Protection

Although some cities are specifically empowered to protect heritage districts (e.g.. St. John's), the only provinical statutes conferring such powers to municipalities generally are the New Brunswick **Heritage Preservation Act**, the Alberta **Historical Resources Act** and the Ontario **Heritage Act**. In the first two cases, permanent protection is possible; however, as in the case of individual structures, protection under the Ontario law cannot exceed 270 days for a structure located within such a district.

More definitive protection, on the other hand, can be granted under the Ontario **Planning Act**. This statute permits any municipality to refuse a demolition permit indefinitely on dwellings in a given zone so long as the applicant refuses to guarantee replacement of the structure by another structure within two years.

C. Local Land Use Legislation

Almost all Canadian municipalities are empowered to control bulk and height of buildings. This power is important for two reasons; infill construction in a heritage area should have a bulk and height which does not detract from the character of the area; furthermore, a low permissable building bulk and height will help discourage demolition and redevelopment within the area. Use is an equally important subject. Almost all Canadian municipalities can control the use of buildings, which is essential in excluding incompatible uses from heritage areas, and in helping stabilize the area's residential component.

The location of a building on a lot can significantly affect the appearance of a streetscape, particularly when it breaks the harmony of a row of buildings. The power to regulate location, or set-back, is clearly spelled out in almost all provinces.

It is obviously desirable to control the design of structures being built or alterations being made in a heritage area. Most provinces specifically empower their municipalities to control design.

D. Local Land Use Procedures

Virtually all Canadian jurisdications insist upon some public notice of changes in land use controls. In no province are muncipalities obliged, as they are under the British **Civic Amenity Act** to plan for conservation. In only a few provinces are they obliged to plan at all.

However, once a plan is initiated, some jurisdictions, e.g. Manitoba and New Brunswick, state that it must take heritage conservation into consideration. In some provinces land use bylaws are not the only relevant legal mechanism; in addition, plans have legal consequences. In such provinces a plan is usually not a prerequisite for land use controls of a heritage nature; but if the heritage bylaws contradict the plan they are open to challenge. Some provinces have established provincial review bodies, called municipal boards (e.g. Ontario) which can invalidate bylaws on the grounds of unreasonableness. This criterion can include almost anything. The experience of the conservation movement with municipal boards can be contentious as some municipal boards have tended to automatically dismiss all municipal attempts to control urban sprawl or highrise construction as unreasonable by definition.

Like other levels of government in Ontario and Alberta, municipal governments will eventually be forced by the Ontario **Assessment Act** and the similar Alberta statute to take various environmental considerations into account in planning public works. Where municipal plans specify that heritage conservation is to be a priority in the community, some lawyers argue that the local government would be impeded from undertaking works which damaged heritage. That hypothesis, however, is still untested.

Canadian courts have adopted a relatively restrictive approach to land use controls and the success rate of citizens' groups invoking such controls has been slow compared to American counterparts.

3. PRIVATE LEVEL LEGAL PROTECTION

A. General

Most private agreements to restrict alterations or demolitions apply only to signatories, not subsequent owners. In order to bind future owners, an easement of covenant must be signed.*

B. Easements and Restrictive Covenants

These covenants are contracted agreements which prohibit the owner of land from doing something on his land, called the servient tenement.**

An easement or covenant can cover a variety of subjects. The best known example is a right-of-way where the owner of land agrees not to interfere with the passage of someone else over his land. Similarly an owner of land can enter into an agreement not to alter or demolish a building on his land.

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* Comprehensive zoning bylaws often exempt local authorities from their provisions and permit municipal buildings and structures to be erected on lands otherwise confined to residential uses.

** The technical difference between an easement and a covenant is sometimes confusing. For example, some organizations, such as the Ontario Heritage Foundation, working with these agreements refer to an easement as the interest in the servient land which the agreement gives rise to, whereas a covenant is the contract which outlines the mutual obligations of the parties.

On the other hand, most texts prefer to define an easement as a proprietor's commitment not to interfere with someone else's activity on the proprietor's land, for example, a right-of-way, whereas a restrictive covenant is a commitment that the proprietor himself will not do something on his own land. Since both easements and restrictive covenants share the same characteristics for conservation purposes, they are treated together in this report.

C. Common Law Standards for Easements and Restrictive Covenants

In order for an easement or covenant to be binding upon future owners, it must spell out that the agreement is for the benefit of other land.*

Consequently, conservationists cannot obtain covenants upon property unless they own something in the area. Even then, there would have to be some indication that their own property benefitted from the covenant (for example, that it retained its value as part of a heritage district, although even the "benefit" may not be concrete enough to satisfy the demands of the law in this area).

Can an easement or covenant not only oblige an owner to tolerate something (a right-of-way, a building, etc.) but also to do something positive (for example, landscaping, maintenance)? Under Common Law, the answer is no because a covenant must be negative in nature. The test is whether the covenant required expenditure of money for its proper performance. Consequently, a covenant to repair would not be binding upon future owners. The same principle applies to easements.

4. THE HERITAGE CANADA FOUNDATION (HCF)

The largest non-governmental organization concerned with cultural property in Canada is the HCF. It is a non-profit organization founded and incorporated in 1973 under the **Canada Corporations Act**. Its financial base consists of an endowment of $13.18 million provided by the Federal Government. An additional $5 million in federal funds were contributed in 1984. In the

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* An easement or restrictive covenant for a right of passage is for the occupants of the neighbouring land. Similarly, an easement or covenant not to demolish will not be binding on future owners unless it specifies a property, a dominant land, which will benefit from the agreement aside from the property being protected. On occasion, courts have insisted that the dominant property must not only be specified, but must be shown to really benefit from the agreement, that is, not just nominally. For example, a restrictive covenant allegedlly for the benefit of land in another community may not be binding upon future purchasers because the other land cannot be shown to really benefit.

1983/84 fiscal year, 62% of the Foundation's revenue was derived from the investment of the endowment fund; 38% was derived from grants, bequests, and donations from its members and corporations. The HCF is not a granting organization.

Major activities are carried out in five program areas: property; Main Street; education and technical services; communications and membership; and public, corporate and government relations.

i) The Property Program's objective is to keep the Foundation abreast of real property issues and to experiment with or demonstrate new approaches to preserving and rehabilitating property in Canada. In cooperation with local perservation groups, businesses, and governments, major area conservation programs have been launched in Edmonton, Winnipeg, Charlottetown, Sherbrooke, Quebec City, St. Andrews, Saint John and St. John's. Demonstration projects are funded out of a revolving fund. This fund has permitted an active role in saving early buildings in Dawson City, Vancouver, Montreal, Halifax, Ottawa and Annapolis Royal.

ii) The historic main streets of smaller Canadian towns are facing decay. The first Main Street project was in Perth, Ontario. Other demonstration projects are in Cambridge, Ontario; Nelson, British Columbia; Moose Jaw, Saskatchewan; Fort Macleod, Alberta; and Bridgetown and Windsor, Nova Scotia.

The Foundation is using the experience gained in the demonstration communities to offer consultant services and training programs to assist other communities in the second phase of the program. This new phase is known as Community Initiated Projects Advisory Services and Training.

The total program is having a significant cultural influence on Canadian communities in preserving their unique historical and architectural heritage. There are also social and economic impacts in terms of job creation and local investment.

iii) As a result of ongoing research, the HCF offers a wide range of technical advice, consultant services and lecture programs for the preservation and rehabilitation of heritage structures and sites. A training program called University Without Walls is available to architects, planners, artisans, contractors, developers and the general public to re-introduce old techniques and demonstrate effective current or new methods and materials which satisfy specific Canadian needs.

iv) The major communications vehicle is the *Canadian Heritage* magazine which is published five times per year.

v) Under public, corporate and government relations, research is conducted on the social, economic and legal aspects of heritage legislation and building regulation at all levels. Efforts are made to represent members in trying to get laws changed or new laws enacted to benefit preservation. Consultations are also held with large corporations such as banks and railways who own heritage buildings and whose actions often affect heritage districts.

Thus the HCF provides a national foundation with resources to concentrate upon basic heritage issues. Being independent of government, it can criticize government policies and has the mandate to encourage the preservation of the built environment with a Board of Governors answerable to the membership.

CHAPTER FOUR

ALBERTA

Introduction

The discussion in this report of heritage preservation within Alberta begins with a focus on environmental impact assessment as a means to help preserve historical resources. The Historical Resource Impact Assessment process is then outlined. Provincial legislation discussed includes the **Land Surface Conservation and Reclamation Act (1973), Historical Resources Act (1980)** and **Planning Act (1980)**. Effects of this legislation are related to individual sites, surroundings of sites, interim protection and binding authority.

Concerning municipal level planning, the application of land use bylaws is discussed followed by controls on demolition, infill construction, interim control on construction, variances and binding authority.

For the private level, the use of restrictive covenants is outlined.

1. PROVINCIAL LEVEL

A. Environmental Impact Assessment (EIA)

The **Land Surface Conservation and Reclamation Act** empowers the Minister of the Environment to order preparation of an EIA if he believes it to be in the public interest. The Act specifies factors to be included in the reports, some of which impact on the conservation, management, and utilization of natural resources; the prevention and control of pollution; economic factors that relate to environmental matters; and preservation of natural resources for aesthetic value. The Act also requires consideration of alternatives to the proposed development.

When called, an EIA may address impacts on historical resources. In such cases, the EIA would indicate that an historical resource may be affected. However, the Historical Resource Impact Assessment (HRIA), if required by the Minister of Culture, is the specific means by which impacts on historical resources are identified and analyzed in detail.

Alberta's resource development decision-making system is a coordinated and integrated system in which Alberta Culture participates as one of several agencies which review resource development projects. The Minister of Culture may institute an HRIA as a separate requirement. The interdepartmental review serves to make all relevant departments aware of specific proposals. The HRIA reports are becoming obligatory not only for the public sector, but also for part of the private sector. HRIA Interim Guidelines are applicable to the following surface disturbances.

- Linear Disturbances
  highways, roads, transmission lines and pipelines.

- Extractive Disturbances
  coal mining, oil drilling, sand and gravel mining, quarrying, and land filling.

- Impoundment Disturbances
  dams, reservoirs, and tailing ponds.

- Intensive Land Use Disturbances
  industrial, residential, commercial, recreational and agricultural siting, and land reclamation work.

An HRIA report must be prepared for disturbance to historical resources defined as any man made or natural work with prehistorical, historical, cultural, natural, scientific or aesthetic value.

B. Legislation

i) Historical Resources Act

This Act **(HRA)** empowers governmental authorities to designate property for protection. There are two forms of designation: as a registered historic resource or as a provincial historical resource. In each case, the designation is ordered by the Minister of Culture. The effect of each will be outlined later in this chapter.

When the Minister decides that a property deserves protection under either form of designation he must notify the owner, although the Act says nothing about notifying tenants. The Minister is under no obligation to give reasons when notifying an owner of impending designation as a registered historic resource, but must do so when the notice refers to impending designation as a provincial historic resource.

The Act does not specify any special recourse for a person whose property faces impending designation as a registered historic resource. When the designation is a provincial historic resource, any interested person may, within 30 days of publication of the notice, notify the Historic Sites Board that he wishes to make representation. When such a request is made, a hearing must take place at least 15 days before the Minister proposes to designate the property. The purpose of the Board is to advise and make recommendations to the Minister on the preservation and protection of historic sites in Alberta. Members are appointed by the Lieutenant-Governor in Council.

The **HRA** is ambiguous as to the consequences of this hearing if it is held. If the Board recommends in favour of designation, then the Minister may proceed. Alternatively, it appears that the Minister can choose not to proceed. On the other hand, if the Board recommends against designation, then it is not clear whether the Minister is entitled to disregard that advice and proceed to designate. A literal reading of the Act suggests that he is not, but such interpretation would effectively give the Board a type of veto power and render it more than a purely advisory body. It is questionable whether such an interpretation corresponds to the intention of the legislature. This question has yet to be decided by the courts. Owners have not been aware of any negative recommendations by the Board, largely because all recommendations have until now been kept secret.

All designations take effect vis-a-vis the owner as soon as they are served upon him, sent to him by registered mail, or published in the Alberta Gazette, whichever occurs first. They take effect against anyone else as soon as they are published in the Alberta Gazette. Designations must also be filed in the local Land Titles Office. Interim protection is available even before the designation formally takes effect; this feature will be discussed later.

ii) Planning Act

Regulations under this Act specify that, where subdivision approval is being sought, the relevant approving authority must send a copy of the application to the Deputy Minister in charge of the administration of the **HRA** if the land that is the subject of the application is located within a half-mile of a provincial historic resource. The subdivision approving authority is, however, required only to consider any comment made by the Deputy Minister.

C. Effects of Provincial Legislation

i) Individual Sites

Registered Historic Resources

No person may destroy, disturb, alter, restore, or repair a registered historic resource, or remove any historic objects from it without giving the Minister of Culture a minimum of 90 days notice. At the end of this notice, the proposed alteration or destruction can proceed. Furthermore, such sites can be exempted from building codes and similar codes.

Finally, the **HRA** states that such resources cannot be transported out of the province without ministerial consent. This latter provision is the subject of considerable debate from the viewpoint of constitutional validity, but has little application to buildings.

Provincial Historic Resources

The effects of this kind of designation are more significant. In the first place, protection for a provincial as opposed to registered historic resource can last indefinitely, rather than for a period of 90 days. No person may destroy, disturb, alter, restore or repair such a provincial resource, or remove any heritage object from it without the written authorization of the Minister of Culture; such authorization can be refused indefinitely. Over 200 sites and structures are under legal protection, for example, St. Stephen's College in Edmonton and Poundmaker Lodge in St. Albert. In addition, there are over 12 historic sites preserved and operated by the province, including the Ukrainian Cultural Heritage Village, Leitch Collieries and Rutherford House (Edmonton).

Second, the Minister must be notified at least 30 days before any disposition of the property, and he must also be notified within 15 days of the transfer pursuant to an inheritance. Until 1978, the Minister was thereupon empowered to purchase the property at fair market value. That power has now been abolished.

Third, the Minister can insist upon the proper maintenance of such property. Fourth, such property can be exempted from building codes and similar codes. Finally, the **HRA** states that provincial historic resources cannot be transported outside the province without ministerial consent.

ii) Surrounding Sites

For the surrounding of designated sites, the **HRA** does not give automatic protection. It is necessary to specifically include these sites in the designating order.

iii) Interim Protection

Under the **HRA**, a site can be protected by one of three methods. Firstly, the Minister can freeze a property under a Temporary Stop Order. The initial freeze period is 15 days with Cabinet renewal if Cabinet sees the property as a possible provincial historic resource. Such a freeze can be appealed to the Alberta Court of Queen's Bench.

A second form of interim protection can be ordered if the Minister of Culture feels that the threat to a site deserves further study. He can order that the alteration or damage be delayed until such time as a proper assessment has been carried out and a report submitted. Also, the Minister is granted wide powers to order protective measures which he considers necessary. The Act states that any licence or permit (e.g., a construction or demolition permit) can be suspended until the Minister is satisfied that the appropriate protective measures have been carried out. This appears to leave open the possibility of virtually indefinite protection.

Thirdly, a form of interim protection takes place as soon as the Minister of Culture serves notice upon an owner that the building may be designated as a registered historic resource or a provincial historic resource. Once the notice is served, the property is immediately protected in the same manner as if the designation process had been completed. This interim protection lasts 120 days unless it is terminated by the Minister or by the courts. Naturally, interim protection of this variety would also end if replaced by formal designation as a registered historic resource or a provincial historic resource.

D. Enforcement

Binding Authority

It is not clear if the **HRA** applies to federal lands or to federally-regulated lands such as railway property. The provincial government is bound by this Act.

2. MUNICIPAL LEVEL

Introduction

Planning for heritage purposes is important because the **Planning Act** makes planning compulsory for agglomerations of over 1 000 inhabitants and rural municipalities of over 10 000.

Upon adoption of a plan, all municipalities of over 1 000 inhabitants are obliged to enact a land use bylaw, but the Alberta statute, unlike legislation of other jurisdictions, does not specify clearly that the bylaw must implement the plan. A heritage-oriented plan is neither a prerequisite to further action nor is it as great a deterrent to unsympathetic municipal action. Nevertheless, a heritage-oriented amendment would be a useful basis for future land use controls and would probably be useful in the long run in other ways as well. Such amendments have already been drafted in other jurisdictions, for example, Ontario.

One partial exception concerning the binding character of plans is the regional plan. This is a plan adopted by a Regional Planning Commission, representing a number of municipalities. All bylaws must be consistent with such a plan.

A. Planning

Land use controls are applied via the subdivision of land and land parcel development under the **Planning Act's Land Use Bylaw.** The Bylaw provides both a listing of permitted and discretionary uses for each land use district as well as the development standards for uses. Since 1970, the focus has been upon specifying land uses that are permitted or discretionary. Uses that may be allowed must be listed, while any not listed are not permitted. In addition, since 1977 there have been no development control areas.

All municipalities utilize the encompassing **Land Use Bylaw.** A form of flexible control is available through the designation of a "Direct Control District". Under a Direct Control District, a council regulates and controls the use or development of land in the district in any manner it considers necessary. This designation can be applied to heritage conservation areas.

While provincial works are not necessarily subject to local bylaw provisions, the **HRA** and the **Land Surface Conservation and Reclamation Act** are binding on all government agencies.

B. Controlling Demolition

i) Government Demolition

Alberta does not use environmental impact assessments to protect the built environment, only archaeological sites, from provincial or municipal demolition.

ii) Other Demolition

In 1978, under the **HRA**, municipalities could henceforth designate buildings for permanent protection. Municipalities are granted specific powers to protect sites and districts; protection is contingent upon compensation.

C. Controlling Infill Construction

i) General

All development, which includes construction or alteration, is subject to the development control provisions of the **Planning Act** and local land use bylaws, wherein uses and buildings must conform to the **Land Use Bylaw.** The same control is available within a Direct Control District, the difference being that Council could regulate as it sees fit.

In 1980, Culture Alberta designated downtown Fort MacLeod as the first provincial historic area. Grants totalling $1.5 million will support resortation.

ii) Use Zoning

Uses are controlled through land use bylaws. A municipality can establish, by a land use bylaw, a heritage/historical conservation district and thereby identify and control uses in a manner suitable to such a district.

D. Interim Control on Construction

All municipalities have land use bylaws under which 'holding' type districts can be established. While such districts are more typically applied to areas reserved for future urban development, it is possible that they could be applied to heritage conservation areas. A holding zone must allow some reasonable use of a property, it is not a total and complete freeze.

E. Provincial Intervention

While the province does not have direct authority, the Alberta Planning Board, upon being referred a dispute between two municipalities may make a decision which is binding on both. However, it is unlikely that another municipality would become involved with heritage conservation matters in this manner.

F. Variances

The **Planning Act** provides that a development appeal board shall be established by a municipality having a population of 1 000 or more and may be established by one having a population of less than 1 000. Where a board is not constituted, the council of the municipality will serve as the board. The board can, within limits, alter the application of the land use bylaw or land use regulation if the development in question does not conflict with the bylaw and would not interfere with the neighbourhood and neighbouring properties.

G. Enforcement

Binding Authority

Municipal bylaws may be enforced on private lands. Such bylaws are not binding on the Crown. However, as previously noted, the **HRA** is binding on the Crown.

3. PRIVATE LEVEL

Restrictive Covenants

The **HRA** empowers the Minister of Culture, the Alberta Historical Resources Foundation and local municipalities to sign restrictive covenants binding future owners even if no other land is benefitted or if the covenant is positive. The condition or covenant must be one relating to the preservation or restoration of any land or building. These special agreements can also be signed by a ministerially approved historical organization. Such agreements can be assigned to other individuals or groups.

As a rare intervention in private contracts, the Minister of Culture can modify a covenant whether or not he is party to the covenant if he considers it to be in the public interest.

CHAPTER FIVE

BRITISH COLUMBIA

Introduction

The built environment of British Columbia (BC), like the prairie provinces, is comparatively young. While archaeological sites document settlement going back 12 000 years, few buildings in BC are older than 100 years. In the west coastal areas especially, nature quickly reclaims the logs and lumber that have traditionally been the mainstay of the region's vernacular construction. Little remains, aside from archaeological evidence and recent reconstructions, of the architecture of the Native peoples or of the early European explorers and traders.

Yet, because BC has grown and developed so recently, many towns have examples of buildings still in use which date back to the first generation of community settlement. While these pioneer structures may be appreciated for their historic significance, for the most part, heritage buildings are identified on the basis of aesthetic, rather than historic, values. The government mandate to conserve heritage resources in the built environment is closely related to concerns about preserving the character of communities.

There are two main types of purposes in conserving structures and streetscapes: First, to protect particular historical and architecturally significant buildings and features against demolition or non-authentic alteration; and second, to maintain the distinctive heritage character of communities by discouraging unnecessary demolitions and unsympathetic alteration or infill development. The former purpose constitutes historic preservation and is considered to be a shared responsibility of all levels of government. The latter is an aspect of sensitive urban design and community planning; in BC community planning is solely the responsibility of local government. Private level protection is discussed related to easements and covenants.

1. PROVINCIAL LEVEL

Introduction

BC has one major piece of legislation to protect heritage, namely, the 1977 **Heritage Conservation Act (HCA)**. Other legislation includes the **Park Act** (1965) and **Provincial Museum Act** (1967). Provincial heritage designation is discussed related to individual sites, compensation, surroundings of sites and areas and districts. Temporary protection and salvage under the **HCA** are outlined, followed by enforcement related to binding authority and penalties. Also, the goals and programs of the BC Heritage Trust are presented.

A. Legislation

i) HCA

This Act is the principal legislation directly related to protecting heritage buildings. It is administered by the Heritage Conservation Branch (HCB) of the Ministry of Provincial Secretary and Government Services. It provides automatic legal protection to specified types of archaeological sites, including significant burial places and North American Indian petroglyphs, pictographs, middens, house-pits and other activity sites. These protected heritage sites may not be altered without a permit from the HCB.

The **HCA** also empowers Cabinet to extend a similar form of protection to other heritage resources through provincial heritage designation. The HCB maintains a Registry of Designated Heritage Sites and Objects, and in conjunction with the National Museum of Man is compiling an inventory or archaeological sites in the province. However, archaeological sites are not discussed in this report.

Other provisions in the **HCA** include the creation of the BC Heritage Trust, and facilitation of the use of restrictive covenants and easements for heritage purposes. Municipalities are also given heritage conservation powers under the **HCA**. These features are discussed later.

ii) Other Legislation and Agencies

Other provincial bodies are also given heritage conservation mandates in their enabling legislation. The Ministry of Lands, Parks and Housing operates historic parks under the **Park Act**. Under the **Provincial Museum Act,** the Provincial Museum collects, conserves and interprets "objects which illustrate natural history and human history of the Province". The Provincial Archives has a similar role with regards to documents. The HCB works with the various provincial land management and resource development agencies of the provincial government to encourage appropriate conservation of heritage resources under their control.

BC has several statutes which provide for environmental impact assessment. Heritage Resources Impact Assessment (HRIA) is a component in any such multi-purpose impact assessment, or may be ordered under the **HCA** whenever heritage resources are threatened. The same general process is applied however an HRIA is initiated. This involves both identifying and assessing the heritage sites which could be adversely affected by a proposed project, and determining an appropriate mitigation and/or compensation program. Due to the nature of the legislation and provincial priorities, HRIA in BC tends to focus on archaeological sites rather than on heritage buildings and structures.

B. Provincial Heritage Designation

i) Individual Sites

Provincial heritage designation is enacted through order-in-council under the **HCA**. The types of resources which can be designated are sites and objects "of historic, architectural, archaeological, paleontological or scenic significance to the Province". Designated sites or objects may only be altered under permits issued by the HCB. With regard to buildings, this requirement can apply to both interior and exterior alterations. Provincial heritage designation has been used very sparingly. Since the power was first created in 1925, 54 sites and objects have been provincially designated; most of these have been sites on provincial Crown land. The **HCA** does not prescribe a procedure for provincial designation.

ii) Surroundings of Sites

The **HCA** does not give automatic protection to the surroundings of designated sites. Thus neighbouring construction can block all view of a heritage site or adjoining properties can be developed for incompatible uses. To protect the surrounding environment of a designated site, the adjoining properties would have to be included in the designation order.

iii) Compensation

When a privately-owned site is designated, if the designation decreases the value of the land the **HCA** requires the Crown to pay compensation to the owner. The procedure, however, for setting the amount is not the same as in the case of an expropriation. Instead, the Cabinet has discretion to determine the amount of compensation to be paid.

iv) Areas and Districts

A heritage designation can apply to an entire area or district. This was done in Vancouver's Gastown and Chinatown. Each individual parcel need not have heritage significance to the province in its own right. In Gastown, for example, vacant lots were designated to ensure design control on the infill development.

C. Temporary Protection and Salvage

There may be times when it is desirable to delay changes to a site pending a Cabinet decision, or to gain time for gathering information necessary for making a decision. No explicit temporary halt order is provided for in the **HCA**, but the Provincial Secretary can order a site survey or site investigation. A site survey involves examination of the land to identify heritage resources. It may also involve documentary research to assess the resources' significance. Generally this takes the form of an HRIA. A site investigation involves salvaging heritage information or material from the site.

When development rather than natural causes threatens a heritage site, the owner (or in the case of Crown land, the proponent) may be required to preserve the heritage resources until a site survey and/or site investigation is completed. The owner or proponent may also be required to pay for the studies. Whenever a site survey or investigation is ordered, the **HCA** requires that it "be undertaken at once in a manner that will not cause undue hardship to the owner of the land".

E. Enforcement

i) Binding Authority

The **HCA** is binding on private owners of heritage resources and on the provincial and municipal governments. Provincial regulations are generally not binding on federal land or federally-regulated works.

ii) Penalties

Criminal penalties for violation of the **HCA** are up to 6 months in jail and/or a $2 000 fine. Civil remedies can include restoration of an illegally-altered site to its pre-alteration condition.

F. British Columbia Heritage Trust

The BC Heritage Trust was established under the **HCA** to further heritage preservation in the province. The Trust provides grants to municipalities and heritage societies; acquires and restores heritage sites; and funds other activities which promote awareness, understanding and appreciation of the province's cultural heritage. Under the Trust's Heritage Area Revitalization Program, a property owner needs to raise only 50% of exterior improvement costs. Likewise, a municipality needs to raise only 50% of the revenue for land improvements.

The Heritage Trust is managed by a Heritage Conservation Board of Directors appointed by order-in-council. The Trust works closely with the Board; the Director of the Board is the Executive Officer of the Trust.

Under the **HCA**, the Trust may receive donations in the form of funds or property. Tax receipts are issued as gifts to the Crown. However, the principal source of revenue for the Heritage Trust has been grants from the BC Lottery Fund. Total expenditures in fiscal 1983/84 were approximately $1.7 million.

2. MUNICIPAL LEVEL

A. Introduction

At the municipal level, the major piece of legislation is the **Municipal Act** (1960). Other legislation includes the **Vancouver Charter** (1953) and the **HCA**. Topics discussed are general planning, subdivision control bylaws, development permit areas, building bylaws, moving buildings and demolition, maintenance and occupancy bylaws.

Development regulations related to zoning bylaws are discussed followed by municipal heritage designation. Topics outlined for such designations are application, procedure, compensation, interim protection, penalties and rural areas.

The municipal level section concludes with discussions of binding authority and statutory changes.

B. Legislation

Community level heritage conservation is enabled under three statues. First, the **Municipal Act** confers planning regulatory powers such as zoning and subdivision control to municipalities. In unincorporated areas these powers are exercised by regional districts. Secondly, community planning in the City of Vancouver is under the **Vancouver Charter** rather than the **Municipal Act**. There are various differences between the two Acts. Thirdly, all municipalities, including Vancouver, are given heritage conservation powers under the **HCA**.

i) General Planning

General community planning powers in BC are required by the **Municipal Act** to have "due regard" for "the preservation of amenities" and "the character of each zone [and] the character of the buildings already erected". This confirms the relationship between general land use planning and conservation of the built environment. For example, the City of Victoria and the federal government signed a $245 000 agreement in 1965 to preserve Bastion Square. The work was completed in 1967 with further assistance from the provincial government and BC Hydro.

There are occasions when a zoning bylaw inadvertantly causes hardship to owners of buildings. For each area covered by a zoning bylaw, the local government must establish a Board of Variance. Under special circumstances defined in the **Municipal Act**, a Board of Variance may relax certain siting provisions of the bylaw as it applies to individual property. The Board of Variance cannot, however, alter the density, use or general intent of the zoning bylaw. In Vancouver, similar powers are also available to the Director of Planning for designated and non-designated heritage buildings.

ii) Subdivision Control Bylaws

Municipalities are empowered to regulate property subdivision. In some neighbourhoods, grounds and landscaping may make a significant contribution to heritage character and property values; further subdivision may be undesirable. Consolidation of small lots in other areas may threaten the continuity and rhythm of the streetscape. Victoria, for example, has used subdivision bylaws in some areas to discourage consolidation and redevelopment.

iii) Development Permit Areas

Municipalities may create development permit areas in places where "special conditions prevail in the physical environment or in design or siting considerations". In such places, supplementary regulations may be enacted regarding such matters as the dimensions and siting of buildings, landscaping, preservation of natural amenities, and signage. The exterior finishing of buildings, other than single-family homes, duplexes and triplexes, may also be regulated. Development permit regulations may not vary the uses or densities established in the zoning and subdivision bylaws.

iv) Building Bylaws

BC has adopted the National Building Code and the National Fire Code. Other regulations relating to health and safety are also adopted by the province and municipalities. Building code regulations are often written in consideration of new construction, although they also apply to older buildings when they undergo rehabilitation or changes in use.

Frequently heritage buildings cannot be economically brought up to code or their heritage character would be lost in meeting code requirements. The provincial Minister of Municipal Affairs is empowered by the **Municipal Act**, to exempt "persons, losses of buildings, materials or areas" from full code compliance, and may establish alternative regulations. The City of Vancouver also has some discretionary authority in this regard under its **Charter**.

v) Moving Buildings and Demolition

Municipalities can "regulate or prohibit the moving of a building from one property to another". They may also regulate building demolition, but this authority does not permit them to delay or reject applications for demolition permits except under the provisions of the **HCA**.

vi) Maintenance and Occupancy Bylaws

Municipalities are only empowered to require owners to upgrade or maintain their properties in situations where they have fallen below health, safety or "nuisance" standards. There is no provision for separate standards for heritage buildings. Vancouver, under its **Charter**, has somewhat greater flexibility in this regard. Its standards may take into account "a neat and tidy condition and a reasonable standard of maintenance prevailing in the neighbourhood".

Neither municipalities nor the province have the power to compell occupancy or use of vacant properties.

Heritage conservation is most effective when it is integrated with land use planning through overall community planning, preferably having its objectives defined in the official community plan. A municipal council is not obliged to implement an official plan. But if a plan is enacted, no bylaw or public work may be approved which would be contrary to the plan.

Under the **HCA** a municipal council may establish a heritage advisory committee. The primary purpose of such a committee is to advise council on any such matter which involves use of the municipal powers in the **HCA**. In practical terms, the committee identifies the community's heritage resources, recommends policies which would promote their retention and enhancement, and assists in implementing the heritage policies approved by council. The Town of Nelson is part of the Main Street Demonstration Program of the Heritage Canada Foundation.

C. Development Regulations

Zoning Bylaws

Zoning bylaws may regulate the use of land and buildings, their size, shape and siting, and the provision of off-street parking and loading space. Existing buildings are more likely to be maintained and rehabilitated if their zoning does not permit redevelopment of the sites to higher densities, but does permit profitable uses which are compatible with their heritage character. This may or may not involve adaption of the buildings to new uses. Zoning bylaws may also require new infill construction to respect the height, setbacks and massing of the existing buildings in their vicinity.

Under the **Vancouver Charter**, zoning bylaws also may regulate building design, and zones may be established "in which there are no uniform regulations". In such zones the Director of Planning and the City Council exercise discretionary judgement in approving or rejecting development proposals. No pre-determined design guidelines are required.

WORKING PAPER NUMBER 44

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D. Municipal Heritage Designation

i) Application

Under the HCA, municipalities may designate heritage sites similarly to provincial heritage designation, except that its prohibitions do not apply to alteration of a building's interior or to landscaping changes. Once designated, a building or structure may not be altered without prior approval by a resolution of the municipal council. A heritage designation need not apply to the entire structure; the facade or individual building elements may be designated. Municipalities are not empowered to designate heritage objects.

ii) Procedure

The HCA only specifies three procedures to enact a municipal heritage designation. The municipality must notify the owner of its intention to designate a property at least ten days before the subject comes up for discussion at municipal council. A similar notice must be published in two consecutive issues of a newspaper in the area three to ten days before council consideration of the bylaw. There is no requirement for a public hearing. After a designation bylaw is enacted, amended or revoked, a notice must be sent to the HCB.

iii) Compensation

The HCA states "Where designation...decreases the economic value of the building, structure or land, the council may, by bylaw, provide a grant, loan, tax relief or other compensation to the owner." It further states "compensation provided...shall be deemed to be full and fair compensation for loss or damage suffered by the owner through the designation."

When the **HCA** was debated in the legislature, the Minister stated that this "shall be deemed" clause would only apply until the contract was proven in court. The **Municipal Act** entitles a property owner to compensation if he/she is "injuriously affected by the exercise of any of [a municipality's] powers." This may create an entitlement to compensation but the legal situation is unclear and has not yet been tested in court. Still, a number of municipalities have elected, by policy, only to designate properties for which mutually satisfactory compensation arrangements have been negotiated with the heritage property owner, or when the owner has waived any claim to compensation.

iv) Interim Protection

When a threat to a possible heritage building becomes apparent, for example, if a demolition permit is requested, the municipal council can impose a 30 day temporary delay. If a designation bylaw is introduced, the property is protected for 60 days or until the bylaw is either passed or rejected. No compensation is required for these interim measures. Temporary delay of work may not exceed 90 days.

v) Penalties

Criminal and civil penalties for violation of municipal heritage protection are the same as for provincial heritage designation.

vi) Rural Areas

The municipal powers under the **HCA** are not available to regional districts.

E. Binding Authority

Municipal and regional district bylaws are not binding on the senior levels of government, on some provincial Crown Corporations, or on most federally regulated enterprises. Provincial and federal properties may legally be zoned or designated, but the regulations are not generally enforceable. Such actions may, however, have some persuasive influence on senior government officials as an indication of local concerns.

F. Statutory Changes

At the time of this writing, two possible statutory changes affecting municipal heritage conservation have been announced. A new **Expropriation Bill** introduced for exposure in the last session would re-define "injurious affection". If passed, property owners would no longer appear to have a claim to legal entitlement to compensation for municipal heritage designation. Councils would still have the ability to pay compensation when they consider it to be appropriate.

Also introduced in the last session was a new **Land Use Bill.** This Bill included many changes to the community planning enabling powers now in the **Municipal Act**. Some would permit more effective integration of heritage conservation with land use planning.

It is not known if either Bill will be re-introduced in the future session.

3. PRIVATE LEVEL

Easements and Covenants

The **HCA** empowers the province, municipalities and the BC Heritage Trust to enter into easements and covenants with property owners. Heritage easements and covenants "run with the land", may be positive or negative in nature and the responsible agency need not own property which would benefit from the contract. These relaxed provisions do not apply to covenants and easements acquired directly by other heritage organizations. However, an agreement entered into by the province, the Heritage Trust or a municipality under the **HCA** may be assigned to a third party, and is enforceable by the assignee.

CHAPTER SIX

MANITOBA

1. PROVINCIAL LEVEL

Introduction

At the provincial level, environmental impact assessment is discussed as related to the environmental assessment and review process and the Manitoba Environmental Assessment and Review Agency. Historical Resource Impact Assessment is outlined. Under legislation, the **Historic Sites and Objects Act** (1970) and the **Planning Act** (1975) are discussed.

Effects of provincial designation are related to individual sites, surrounding sites and interim protection. Enforcement is related to binding authority.

A. Environmental Impact Assessment

i) Environmental Assessment and Review Process (EARP)

Manitoba has no environmental impact assessment legislation. EARP applies only to provincial government projects, for projects involving provincial funding, and federal projects by mutual consent. EARP is administered by the Department of Environment and Workplace Safety and Health. The Manitoba Environmental Assessment and Review Agency (MEARA) reviews projects which may have potentially significant environmental impacts.

The scope of an EIA focuses on the potential impacts of the project in terms of its effects on air, soil and water. The possiblility of broadening this scope and including it within eventual environmental assessment legislation is being considered, for example, impact on historic and archaeological resources are routinely considered. Guidelines are prepared for specific classes of projects. The development projects of concern to historical resources generally include one or more of the following surface disturbances.

- Linear Disturbances
  highways, roads, transmission lines and pipelines.

- Extractive Disturbances
  coal mining, oil drilling, sand and gravel mining, quarrying, and land filling.

- Impoundment Disturbances
  dams, reservoirs, and tailing ponds.

- Intensive Land Use Disturbances
  industrial, residential, commercial, recreational and agricultural siting, and land reclamation work.

MEARA is responsible for reviewing and evaluation EIA documents. The results of such evaluating are reported to the public, at the discretion of the Minister. Comments received from the public are incorporated into the Review Agency's evaluation. The results of this final draft evaluation report are subsequently reported to the project proponent along with a letter of approval, modification or rejection of the project from the Minister.

A significant linkage exists between MEARA and the Interdepartmental Planning Board of the Manitoba Provincial Land Use Committee of Cabinet, which administers Manitoba's land use policies. The link between land use planning and environmental management can, in some cases, be very close and has allowed for co-operation between two groups in that:

o The Interdepartmental Planning Board Process works through the medium of local government and therefore its effectiveness in sparsely populated or remote areas becomes limited. EARP, on the other hand, is not so restricted. In such situations, an alliance between the two groups can be very beneficial.

- The Land Use Committee's primary concern is to protect and maintain land use practices which are considered desirable for various reasons, while EARP's focus is the environment with land use only one of several concerns to be considered. The two processes have proven to complement each other in some instances more than others, such as in regional assessments of electrical transmission lines rather than very localized ones such as highway stream crossings.

ii) Historical Resource Impact Assessment (HRIA)

Such assessments are administered by the Department of Culture, Heritage and Recreation (DCHR) under the **Historic Sites and Objects Act**, discussed in the next section of this chapter. Under this Act, the Historic Sites Advisory Board, consisting of not less than five members makes recommendations to the Minister concerning provincial historic sites. The Board's recommendations regarding buildings are usually one of the following:

- The building should be designated as a provincial historic site and protected under the **Historic Sites and Objects Act**;
- The building should be identified with an historic site marker and a pamphlet but not protected under the Act; or
- The building is not of provincial significance and should be neither identified nor designated by the province.

If a building is recommended for designation as a provincial historic site, the building owner is contacted and discussions are undertaken concerning the designation recommendation. Under Section 3 of the Act, buildings designated by Order-in-Coucil as provincial historic sites, cannot be damaged, destroyed, removed or altered unless issued a permit to do so. Although there is currently no grant program for designated historic sites, in very special circumstances, pursuant to Section 8(1) of the Act, the Minister may consider requests for special project funding.

The first step for a building to be considered as a provincial historic site is for the applicant to complete a Building Request Form. After the form has been completed and returned to the Historic Resources Branch, staff examine and photograph the building and a report is prepared for the Historic Sites Advisory Board. The report contains architectural and historical information concerning the building and, in order to place it in a provincial perspective, compares the building with others of similar type, age, style and construction.

B. Legislation

i) Historic Sites and Objects Act (HSOA)

As previously stated, this Act is administered by the DCHR. An historic site is a site, parcel of land, building or structure declared by regulation to be an historic site. On the Minister's recommendation, Cabinet may designate any land or structure to be an historic site. Thus "No person shall damage, destroy, remove, improve, or alter an historic site without a valid subsisting permit to do so under the regulations and except to the extent authorized by such a permit." The Minister is given discretion to accept or reject construction, alteration or demolition on protected property as he sees fit.

If any site, parcel of land, building or structure is not considered by the Minister to be an historic site but has historic or archaeological importance or interest, he may take action to preserve such sites, parcels, buildings or structures. Such action, with the approval of the Lieutenant-Governor in Council, involves entering into an agreement with the owner, occupier or developer. The **HSOA** is currently under review. A "Discussion Paper on New Heritage Legislation for Manitoba" was issued by DCHR in October, 1984.

ii) Planning Act

The Ministers of Municipal Affairs and Urban Affairs administer this Act. The Cabinet is empowered by this statute to establish special planning areas for the preservation of historic and archaeological structures and sites, and adjacent areas. This can be done in any part of Manitoba except Winnipeg and lands designated as provincial park lands under the **Provincial Park Lands Act.** However, no such special planning areas have ever been established.

A special planning area is subject to a system which is commonly called development control. The designation suspends the application of all existing plans and zoning in the area; and provides, no development shall be undertaken within the area without the written permission of the Minister of Municipal Affairs following consultation with the municipalities or district.

Development means any "operations on, over or under land, or the making of any change in the use or intensity of use of any land or building or premises."

Since demolition constitutes a radical change in the use of a building, demolition is presumably a form of development that would be subject to control. However, jurisprudence is still divided on the interpretation of land use controls, with some courts holding that controls cannot be inferred. Thus, the **Planning Act** could not be used to control demolition unless the Act referred specifically to demolition control; inferences would be insufficient. Under such a narrow interpretation the Act could control only infill construction and not demolition.

C. Effects of Provincial Designation

i) Individual Sites

As mentioned above, a site parcel of land, building or structure declared to be an historic site under the **HSOA** cannot be changed without governmental permission. An area declared as a special planning area under the **Planning Act** may be any geographic or social unit. The designation of a special planning area is intended as a first and interim measure pending preparation and adoption of more comprehensive protective legislation for the area.

To sustain a designation, it must be made for the bone fide purpose of protecting heritage; thus, it is not subject to challenge in the courts.

ii) Surrounding Sites

Manitoba statutes do not give automatic protection to the surroundings of designated sites. The **Planning Act** provides for the inclusion of areas adjacent to historic sites and inclusion in the special planning area.

iii) Interim Protection

The **HSOA** does not specifically empower the Minister to halt work pending study of an identified site. The only method to protect an endangered building is immediate designation. The Minister cannot suspend a licence or permit for construction or demolition issued by a municipality.

Under the **Planning Act**, the Minister can issue a building or development permit but no other interim control order would be issued without discussion of development.

D. Enforcement

Binding Authority

The **HSOA** and the **Planning Act** do not apply to federal lands or federally regulated lands such as railway property. Likewise, the provincial government and its agencies are not bound by either statute. However, these Acts bind all other owners.

Concerning the disposal of abandoned railway rights-of-way, Manitoba, through a Gifting Agreement signed with the federal government in 1981, is acquiring 17 railway lines together with 73 station grounds totalling 700 kilometres throughout Agro-Manitoba. The Provincial Land Use Committee of Cabinet approved guidelines to dispose of these lands. Basically, after the interests of the province have been identified, the remaining lands will be disposed of in the following manner.

With respect to rights-of-way in rural areas, lands will be offered to adjacent landowners at a fee of $75 per right-of-way per quarter section and subject to consolidation of the abandoned right-of-way with the owner's existing title.

Station grounds will be reviewed through a Technical Advisory Committee which will recommend to the Department of Government Services how best to deal with each situation (case). The Committee will involve appropriate municipal councils, local planning authorities and other groups to ensure that all interests are taken into account. Attention will be given to the needs of local municipalities for public purposes. A special fund of $75 000 is to be set aside within the Winnipeg Land Titles Office for abandoned railway surveys where they may be required.

2. MUNICIPAL LEVEL

A. Introduction

There are two main purposes behind any action to conserve structures and streetscapes: first, to protect valuable buildings against demolition and unsympathetic alteration and, secondly, to maintain the integrity of the scene by discouraging unsympathetic infill construction. The latter purpose is particularly important in the preservation of streetscapes and areas. Heritage concerns are governed by the **Planning Act**.

Municipal planning is outlined under general factors, effects of planning, the City of Winnipeg and controlling demolition. This is followed by controlling construction under general factors, development control system and use zoning. Other subjects discussed are interim control of demolition and construction, provincial intervention, variances and enforcement - binding authority.

B. Planning

i) General

There is no obligation on communities to plan for conservation. Municipalities are not obliged to draft plans of any description.

Normally, a municipality or planning district, representing more than one municipality, will undertake a development plan on its own initiative. In that case, or where it has been ordered to draft a plan, the plan must take into account the preservation, projection or enhancement of areas of land, buildings and structures by reason of their historical, archaeological, geological, architectural, environmental or scenic significance. This is in accordance with Provincial Land Use Policy Number 9 - "Areas critical to the existence of rare or endangered plants or animals, significant natural features, and cultural and historic sites of the region shall be identified and should be designated and preserved."

The objectives and application of Policy Number 9 to man made heritage are as follows.

The objectives of this policy are to:

- Commemorate, protect and reconstruct significant themes and events in history by preserving prehistoric and cultural sites and artifacts in order to increase an understanding of the contributions to Manitoba's historic development made by significant groups and individuals.

- Encourage awareness and continued use of Manitoban buildings which illustrate unique or interesting architectural form and design or that are connected with historically significant people, groups, places, events or themes in Manitoba's development.

Policy application and implementation are:

- No subdivision or development should be approved for those areas formally identified as critical to the existence of rare or endangered plants or animals, significant natural features or significant cultural and historic sites. The areas identified shall be large enough to effectively protect the site.

- Development may take place at a site of cultural or historic significance after the site has been examined by the Historic Resources Branch (DCHR) or its designate. Procedures for investigations and work at such a site are outlined in the **HSOA**.

- The salvage costs incurred as a result of the development of a site which eliminates a cultural or historic site should be at the expense of the developer and such work should be completed before the commencement of any proposed site development. Such costs should be identified as part of the budget of the development work which will actually disturb the site and in no case should exceed 1% of the total cost of such development work.

- All commercial exploitation of historic sites should be approved by the Historic Resources Branch.

ii) Effects of Planning

Under an adopted plan, no bylaw can be validly passed which would be contrary to the plan or its intent. Thus, if the municipal plan or planning district plan contains provisions incompatible with heritage conservation, an amendment can be made. In theory, a specified conservation area supported by an appropriate zoning bylaw is protected from provincial or municipal public works projects which would detract from heritage conservation. This is untested in the courts, however, heritage-oriented amendments to a development plan seem to be the most appropriate course of action.

iii) City of Winnipeg

The **City of Winnipeg Act**, administered by the Minister of Municipal Affairs, is the enabling legislation for Winnipeg; the **Municipal Act** and **Planning Act** do not apply. The development plan for the City is the Greater Winnipeg Development Plan which includes heritage sites and areas. For particular districts of Winnipeg, there are community plans or action area plans. There is no provision in the Act stating that these plans or the Greater Winnipeg Development Plan are binding on private owners. There is a binding effect of these plans on private works.

iv) Controlling Demolition

Within Winnipeg, alteration and demolition controls are outlined in the **City of Winnipeg Act**. Also, the Buildings Conservation List under the Act provides for the designation of heritage properties that cannot be altered or destroyed without the City's consent.

Other Manitoba municipalities cannot control heritage site demolition, either permanently or temporarily. The Planning Act does not refer specifically to demolition control. However, the Act does provide for development plans with heritage conservation objectives and requires municipalities to zone so as to realize planning objectives.

A revitalization program in Winnipeg is the Winnipeg Core Area Initiative Neighbourhood Main Street Program administered by the Department of Municipal Affairs. Local communities can receive two-thirds of the costs of approved public property improvements and one-third of the costs, to a maximum of $500 per property, towards storefront renovations.

C. Controlling Construction

i) General

The general philosophy of land use controls in all provinces is that a land owner may do virtually anything with his property except as prohibited by regulations, usually zoning bylaws. Under a development control system, the owner can perform only authorized changes. The City of Winnipeg uses a modified development control system which is unavailable to other Manitoba municipalities.

ii) Development Control System

This system cannot be instituted unless a community plan, in addition to the Greater Winnipeg Development Plan, exists in the area to be affected. Development control is instituted by a bylaw designating the area in which the system is to apply. The system supercedes existing zoning. Thus, no development can occur unless development permission is obtained from the City.

The **City of Winnipeg Act** authorizes the City to enter into development agreements with owners as a condition of a zoning change or, where the the property is within a development control area, of the granting of development permission. Such agreements may deal with the same matters which can be the subject of conditions attached to the granting of development permission. In the case of zoning change applications, the **Planning Act** gives this same power to other Manitoba municipalities.

The Department of Urban Affairs administers the Canada-Manitoba-Winnipeg Tripartite Agreement for the Winnipeg Core Area which provides for a minimum public commitment of $96 million over five years (1982-86) to the revitalization of the physical and social environment of the core area. Program 9, Historic Winnipeg Area Development, is one of 13 Core Area programs and allocates $5.1 million to the rehabilitation and restoration of the nationally significant collection of turn-of-the-century warehouse buildings found within the Historic Winnipeg Area. Program 9 seeks to achieve area revitalization through several means, including the accommodation of arts groups in vacant and underutilized space, the expansion of existing businesses and the encouragement of new ones and the infusion of new residential uses into designated buildings.

The above mentioned Agreement conforms to City of Winnipeg bylaws related to heritage. These are the Historical Buildings Bylaw 1474/77 and the Historic Winnipeg Restoration Area Bylaw 2048/78.

iii) Use Zoning

Municipalities are empowered to regulate property uses under the **Planning Act** and the **City of Winnipeg Act**.

D. Interim Control of Demolition and Construction

There is no provision authorizing municipalities to withhold demolition permits. As previously outlined, municipalities outside Winnipeg are not authorized to designate specific heritage properties. All municipalities can withhold a construction permit for 60 days. If the proposed project appears to be incompatible with a plan which has either been adopted or is in preparation, then a Council can withhold the permit for an additional period. Winnipeg can extend the delay by 90 days and, when a plan has been forwarded to the Minister for approval, by a further 35 days. Other municipalities are for a period of 125 days pending the adoption of the appropriate land use controls. If, however, a municipality fails to enact the relevant land use controls within the specified period, it becomes liable in damages to the owner of the property.

E. Provincial Intervention

The Minister of Municipal Affairs is empowered to compel Councils to adopt plans and bylaws or to confirm to and enforce plans and bylaws already adopted. However, this has never occurred.

F. Variances

In order to change a land use control applied to a property, a property owner can apply to a municipal variation board. In Winnipeg, a designated committee can change land use controls.

G. Enforcement

Binding Authority

As previously stated, the applicability of non federal regulations, including municipal bylaws, to federal and federally-regulated works has been the subject of considerable jurisprudence. Manitoba municipalities are given no authority to subject provincial works to municipal bylaws. In the absence of any statutory authority to the contrary, municipal bylaws do not apply to the Crown. Municipalities are bound by the **HSOA** and the **Planning Act.**

In Winnipeg, the provincial government and its agencies are under no obligation to obey the bylaws of the City. Furthermore, the Cabinet has the right to exempt any agency or person involved in a government program or project from the bylaws of Winnipeg.

Municipal public works must respect official plans. Similarly, bylaws must conform to the plans in force. As far as bylaws are concerned, it appears that municipalities are bound by their own bylaws; however, they can formally exempt themselves from them.*

3. PRIVATE LEVEL

i) Statutory Reform

Manitoba does not have special legislation validating heritage easements and covenants and providing for registration against the title to property. Thus Agreements under the Status Quo must be used.

ii) Agreements Under the Status Quo

A contract can be drafted which, without being an easement or restrictive covenant, includes many protective provisions and still has some effect upon future owners. The contract can state that the owner will secure the signature of future buyers to the protective agreement. If future buyers refuse to sign, then the owner will be liable for damages. This technique succeeds in protecting a good number of properties.

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* Comprehensive zoning bylaws often exempt local authorities from their provisions and permit municipal buildings and structures to be erected on lands otherwise confined to residential uses.

CHAPTER SEVEN

NEW BRUNSWICK

1. PROVINCIAL LEVEL

Introduction

At the provincial level, legislation discussed is the **Historic Sites Protection Act** (1978), **Community Planning Act** (1973) and **Municipal Heritage Preservation Act** (1978). The effects of provincial heritage designation are outlined under individual sites, surrounding sites, areas and districts and interim protection. Enforcement is related to binding authority.

A. Environmental Impact Statement

There is no statute providing for this procedure.

B. Legislation

i) Historic Sites Protection Act

The Minister of Tourism, Recreation and Heritage (TRH) is empowered by this Act **(HSPA)** to follow a two-fold designation procedure for heritage sites. He may designate any site, parcel of land, building, or structure of any kind to be an historic or anthropological site and the property thereupon becomes eligible for protection. Thus, no person is permitted to excavate or alter a protected site or remove or cause to be removed any protected object unless he is the holder of a permit. The Minister is thereby given discretion to accept or reject construction, alteration or demolition on protected property as he sees fit. The Act does not specify any special recourse for a person whose property has been designated a protected site.

ii) Community Planning Act

It is unclear whether the intent of this Act **(CPA)** is to preserve historic and anthropological sites. If this is the intent, the following interpretation can be made.

This Act permits the Minister of Municipal Affairs and Environment to prepare regional development plans, which are formally adopted by the Executive Council. Once adopted, the plan shall prevent the undertaking of any development inconsistant or at variance with a municipality or other person. Section 1 of the Act clearly states that demolishing, altering, repairing or replacing a building are forms of development; the inference being that a plan can control alteration and demolition in the same manner as it controls other forms of development.

The assumption that plans, are by themselves, binding on owners. If plans are not binding, they cannot be used to control demolition or any other development.

iii) Municipal Heritage Preservation Act

The Minister of Municipal Affairs and Environment administers this Act **(MHPA)** which has the purpose to promote the educational, cultural, economic, and general welfare of the public through municipal bylaws for the preservation and protection of lands, buildings and structures of historical or architectural significance. Preservation areas are established by bylaw on recommendation of a preservation review board. Such areas are applicable to a municipality, portion of a municipality, or a building or a structure in a municipality of historical or architectural significance.

C. Effects of Provincial Designation

i) Individual Sites

An area designated as a protected area under the **HSPA** may be as large or as small as the Executive Council desires.

The protection of an individual site can be largely accomplished by having it designated as an historic site and then as a protected site by the Minister of TRH under the **HSPA**. Future changes would thereupon require governmental permission.

As previously noted, the use of the **CPA** to avert heritage demolition is untested in the courts.

ii) Surrounding Sites

The statutes do not give automatic protection to the surroundings of designated sites, thus neighbouring construction may block all views of the heritage site. To protect vistas of such sites, it would be necessary to include them in the designating order.

iii) Areas and Districts

Under the **HSPA**, historic districts may be designated. The establishment of a preservation area or the making of a bylaw under the **MHPA** is subject to the **HSPA** and must comply with any official regional, municipal or area plan; basic planning statement; and development or urban renewal scheme in a municipality where a preservation area is being established.

The **HSPA** permits the Minister to designate an entire area as a protected site. Thus site means districts as well as individual buildings.

Under the **CPA**, planning districts can be established and planning controls can be applied on a district-wide basis. There are no limits as to the district size, presumably at the Minister's discretion.

iv) Interim Protection

Protection under the **HSPA** takes effect upon registration of a description of the land designated as a protected site. However, immediate designation subject to the possibility of later undesignation is the only way to protect a threatened site.

It may be possible to introduce protection without statutory amendment, by the enactment of regulations under the **HSPA**. No such regulation has been passed to date.

Aside from regional plans as under the **CPA**, the Minister of Municipal Affairs can use area plans in locations which are outside municipal boundaries. In general, since area plans possess the same characteristics as regional plans, they too might be able to control development.

D. Enforcement

Binding Authority

Neither the **HSPA** nor the **CPA** are binding upon all heritage owners. They do not apply to federal lands or federally-regulated lands. However, these two Acts bind the provincial government and its agencies, plus all other owners, including municipalities. Under the **MHPA**, no person can carry out development in a preservation area without a certificate of appropriateness from a Preservation Review Board.

2. MUNICIPAL LEVEL

Introduction

The two main purposes behind any action to conserve structures and streetscapes are first, to protect valuable buildings against demolition and unsympathetic alteration, and second, to maintain the integrity of the scene by discouraging unsympathetic infill construction. The **MHCA** and the **CPA** may be used for these purposes.

Municipal heritage preservation is discussed under planning, controlling demolition, controlling construction, interim control of demolition and construction, provincial intervention, variances and enforcement through binding authority.

A. Planning

There is no obligation on municipalities to plan for heritage preservation; they are not obliged to draft plans of any description. The Minister of

Municipal Affairs and Environment, under the **CPA**, may, however, compel the municipality to draft a plan and/or put it into effect. Once a municipality has been ordered to draft a plan, or if it undertakes a plan of its own initiative, the plan must take into account preservation of buildings and sites of historical interest.

B. Controlling Demolition

The **MHPA** binds the provincial government. Since all bylaws made under the Act, including those establishing preservation areas, are subject to the approval of the Executive Council before they are valid, the province can veto any preservation area which might interfere with a provincial project. It can also veto bylaws prohibiting demolition in such an area. Section 11 of the Act further provides that the establishment of a preservation area or the making of any bylaw under the Act has to comply with any official plan, such as a regional plan, municipal (or area) plan, basic planning statement, development scheme or urban renewal scheme. If the provincial government has already approved such a plan which has anti-heritage consequences, it would be difficult for a municipal bylaw creating a preservation area to overturn that effect.

This Act also sets out the terms of reference upon which a municipal council may make bylaws related to preservation areas. The demolition and alteration of buildings are subjects addressed under such bylaws. These bylaws may provide for the development and redevelopment of lands, buildings and structures. Development is defined as the demolishing or altering of a building or structure, in whole or in part. Also, such bylaws may be made prohibiting the demolition of buildings and structures. In Saint John, the Trinity Royal preservation district, 20 blocks of commercial and residential space, was created and is regulated by a preservation area bylaw and is administered by a review board.

Section 12 of this Act states that no development can be carried out in a preservation area unless a certificate of appropriateness is obtained from the Preservation Review Board. In addition, no development can be carried out in accordance with such a certificate until every right of appeal established under the Act has been exercised or until the time prescribed for the exercise of that appeal right has expired.

C. Controlling Construction

i) General

Under the **MHPA**, a municipality may make bylaws regarding construction in preservation areas, since the Act provides for the development and redevelopment of lands, buildings, and structures. Development includes erecting a building or structure. Powers specifically given to a municipality to control construction are also listed.

ii) Use Zoning

Municipalities are empowered to regulate property uses. Usually existing zoning designations are maintained and extra conditions to protect special features of an area are added.

D. Interim Control of Demolition and Construction

If a municipality suddenly receives an application to demolish a structure or to build in an unsuitable area, it does not have the delaying powers granted municipalities in certain other provinces. It cannot postpone demolition or construction pending adoption of corrective measures. The **MHPA** makes no provision for interim control. It does not make provision for issuance of a stop order, delay until an assessment of and report on the proposed alteration are done, or ordering whatever protective measures are considered necessary.

However, demolition and construction can be postponed if the municipality was not caught completely offguard; that is, if it had already authorized public notice of its intent to draft a relevant plan, basic planning statement or bylaw. In the latter case, it can postpone all applications for development, and hence both demolition and construction for up to six months pending adoption of the relevant land use control. There may, however, be some communities which fail to recognise that the **CPA** equates demolition with development and hence may not even ask that owners apply for a permit to demolish.

E. Provincial Intervention

The Minister of Municipal Affairs and Environment can compel a municipality to conform to or enforce its official plans; if it fails to, the Minister can take action.

F. Variances

The **MHPA** provides any aggrieved person with a broad right of appeal to the Provincial Planning Approval Board. A further right of appeal exists from the Board to the Supreme Court. The Act further provides that any person directly affected by the operation of a bylaw may apply to the Supreme Court for an order quashing that bylaw.

G. Enforcement

Binding Authority

The province is exempted under the **MHPA**. As far as the **CPA** is concerned, the province is prohibited from undertakng any development at a variance with a plan, but is otherwise exempted from complying with the Act and any bylaw.

Municipal public works must respect official plans as under the **CPA**. Similarly, the establishment of any preservation area and the making of any bylaw, under the **MHPA** must comply with any regional plan, area plan or planning statement.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

Under the **HSPA**, several parties can enter into covenants which will bind future owners even if no other land is benefitted and if the covenant is positive. Such parties are the Minister of TRH or anyone else whose easement or covenant has been approved by the Minister.

The first prerequisite for such an agreement to be registered as an easement or covenant binding on future owners is that a property must be an historic site. This presumably means that the property must have been designated by the Minister as an historic site under the **HSPA**. Of the various provinces which have introduced special heritage easements and covenants -- British Columbia, Ontario, Prince Edward Island, and Quebec -- New Brunswick is the only one to require such a formality.

If the agreement is signed by the owner and the Minister, it can be registered at the local land registry office and become binding not only on present owners but also on future owners. It is enforced by the Minister and his successors in that office. If the agreement is signed by the owner and someone other than the Minister, it must first be approved by the Minister before it can be registered and become binding on future owners. It would be enforceable by the person contracting with the owner along with that person's successors. The Act also permits these agreements to be assigned to other parties; for example, if an owner entered into an approved easement or covenant agreement with X, X could assign his rights (that is, enforcement) to Y, who could then enforce the agreement in X's place.

CHAPTER EIGHT

NEWFOUNDLAND AND LABRADOR

1. PROVINCIAL LEVEL

Introduction

Topics discussed are environmental impact statements and legislation - **Historic Objects, Sites and Records Act** (1973), **Urban and Rural Planning Act** (1970) and **Municipalities Act** (1979). Effects of provincial designation are related to individual sites, surrounding sites, areas and districts and interim protection. Enforcement is via binding authority.

A. Environmental Impact Statement (EIS)

The **Environmental Assessment Act** (1980) is administered by the Minister of Environment who determines whether an EIS is necessary for a proposed undertaking, either private or governmental. The EIS, if ordered, must describe and evalute not only the undertaking but alternatives, the environment itself, and the likely effects of the project on that environment. It must also propose measures designed to minimize or remedy any significant harmful impacts.

Environment is broadly defined under the Act and includes "the social, economic, recreational, cultural and aesthetic conditions and factors that influence the life of humans or a community," as well as "any building, structure, machine or other device or thing made by humans."

B. Legislation

i) General

Heritage sites and districts are protected by three statutes - **Historic Objects, Sites and Records Act**; **Urban and Rural Planning Act** and **Municipalities Act**. The first two Acts provide six mechanisms to designate property of cultural importance. The former provides one such mechanism, the latter, five mechanisms -- Municipal Plans, Protected Areas, Regional Plans, Local Area Plans and special regulations to implement the provisions of such plans. The **Municipalities Act** provides for the designation of any real property as heritage buildings, structures or lands.

ii) Historic Objects, Sites and Records Act (HOSRA)

This Act is administered by the Minister of Culture, Recreation and Youth who can "declare to be an historic site any site, area, parcel of land, building, monument or other structure...which is considered by the Minister to be of historical or architectural significance". The consequences of this designation are that "no person shall move, destroy, damage, deface, obliterate, alter or interfere with the designated site without the Minister's written consent." The Minister is thereby given discretion to accept or reject construction, alteration or demolition as he/she sees fit. There are eight provincial historic sites protected under this Act.

iii) Urban and Rural Planning Act (URPA)

This Act is administered by the Minister of Municipal Affairs and provides five separate possibilities for the protection of the built environment.

First, the Cabinet may declare any area of natural beauty or amenity to be a Protected Area, where in its opinion the preservation of the natural amenities of the area requires that development be controlled. The provision has been used in at least one instance to protect an area of natural beauty which includes heritage structures.

There are three planning mechanisms which the province can set in motion under this Act and which provide, at least theoretically, even further alternatives for conservation activity.

One is the Regional Plan provided for in Part V of the Act. The Minister of Municipal Affairs can define any area and declare it a Regional Planning Area. A Regional Plan is then prepared by the Provincial Planning Office or other authority designated by the Minister.

Once the Minister has approved the plan, Cabinet can issue a Regional Development Order, the effect of which is similar to that of the Protected Area Order -- all development must conform to the terms of the plans and the zoning and other regulations which implement it. Under Parts II and III of the Act, Councils may prepare municipal plans and joint municipal plans, and under Part IV of the Act the Minister can indicate a Local Area Plan for any area not covered by a Municipal Plan or Joint Municipal Plan. Upon the Minister's approval of a plan, the appropriate authority may exercise development control powers with respect to the area.

iv) Municipalities Act

Heritage policies of a municipal plan can be implemented under this Act by establishing a heritage area. Such an area may be designated and comprised of heritage buildings, structures or lands. Such designations shall not be demolished or built upon nor the exterior of such a building or structure altered, except under a permit of the council specifically authorizing the alteration and in accordance with the terms and conditions of the permit.

A municipal council may establish a Heritage Advisory Committee to advise on the preservation of real property. A council may order the removal of any building or structure without a permit within a heritage area or the restoration of the exterior of any heritage building or structure altered other than in accordance with the terms and conditions of the permit.

C. Effects of Provincial Designation

i) Individual Sites

A site designated under the **HOSRA** cannot be changed without governmental permission. Under the **URPA**, a protected area can be as large as Cabinet desires, lot size or smaller. However, designation of a protected area has no legal consequences until a plan or scheme has been drafted which provides for the conservation and development for public use of an area's natural amenities. Once the plan or scheme is prepared, Cabinet may issue a Protected Area Order prohibiting all development that conflicts with or is inconsistent with the plan or scheme. The Order may also authorize any public authority to make regulations for the implementation or enforcement of such plans or schemes.

ii) Surrounding Sites

Automatic protection is not provided to the surroundings of designated sites. Neighbouring construction may block the view of a heritage site. To protect vistas to a site, they must be included in designation orders.

iii) Areas and Districts

Under the **HOSRA**, entire built-up areas can be designated by Cabinet. There are no restrictions regarding the designation of heritage areas or buildings under the Regional, Municipal, Joint Municipal or Local Area planning provisions of the **URPA**.

iv) Interim Protection

The **HOSRA** does not specifically empower the Minister to halt work pending study of an interesting site. Consequently, immediate designation by Cabinet is the only way to protect an endangered building or structure. Broad protective measures are also lacking, for example, no mention is made of ministerial suspension of municipal licences or permits related to construction or demolition.

For Protected Areas or Protected Roads, the **URPA** does not contain stated interim protective measures. Since the designation itself does not restrict development pending the preparation of detailed controls, interim measures are important.

D. Enforcement

Binding Authority

Provincial statutes do not apply to federal lands or federally-regulated lands such as railway property. Crown land is subject to the **HOSRA**.

Under the **URPA**, the Protected Area Order can bind all public authorities including the Crown. Similarly, Regional Development Orders are binding where a Regional Plan is in effect. Local area plans, like municipal plans, are not binding on the province, but are never the less treated as if they were.

2. MUNICIPAL LEVEL

Introduction

The two main purposes for conserving structures and streetscapes are first, to protect valuable buildings against demolition and unsympathetic alteration and, second, to maintain the integrity of the scene by discouraging unsympathetic infill construction. The latter purpose is particularly important in the preservation of streetscapes and areas.

Newfoundland municipalities are governed by the **Municipalities Act** and the **URPA**.

The cities of St. John's and Corner Brook have their own enabling legislation, the **City of St. John's Act** (1970) and the **City of Corner Brook Act** (1970), but are also governed by the **URPA**.

Topics discussed at the municipal level are planning, controlling demolition, controlling construction, interim control of demoliton and construction and provincial intervention. Enforcement is via binding authority.

A. Planning

i) General

Newfoundland municipalities are not obliged to consider heritage in the planning process. The preservation of historic sites and districts is not specifically stated as a purpose of municipal planning, however, a municipal plan is required to coordinate the public purposes of the Council.

ii) Urban and Rural Planning Act

Under this Act, a municipality may, but is not required, to draft a plan or plan amendments unless requested to do so by the Minister of Municipal Affairs. Once a plan is in effect, a Council develops a scheme for land use control in strict conformity with the municipal plan and land use zoning (or development) regulations are prepared. The Act declares that a municipal plan is binding on all persons and requires that proposals for land use be implemented by zoning and other regulations.

Since Newfoundland plans can directly control development, municipal works are affected. If a municipal plan specifies heritage conservation in an area it would be legally hazardous for the municipality or the province to undertake public works projects which would detract from the heritage value of the area. Consequently, municipalities wishing to preserve heritage structures should make provisions in the municipal plan. Two heritage plans have been prepared for Corner Brook and Trinity-Trinity Bay, which will provide for special development neighbourhood controls. Once the plans and implementing bylaws for the heritage policies of Corner Brook and Trinity are in place, the municipalities will exercise control over the physical use of heritage buildings and lands, as part of the municipal plan implementation process.

B. Controlling Demolition

Under the **City of St. John's Act**, heritage structures may be designated as well as areas of the city. Thus a designated property cannot be demolished or built upon, as appropriate, or the facade or exterior of a building or structure be altered except with Council approval. The **Municipalities Act** provides comparable powers to designate and protect heritage buildings, structures or lands within other municipalities.

C. Controlling Construction

i) General

Development control is available on an interim basis under provincial supervision. The **URPA** provides for such control by a municipality pending the preparation and coming into force of a municipal plan and its implementing regulations. Once the planning process has been initiated, an interim develoment order is virtually automatic. The order is made by the Cabinet and suspends the application of existing controls affecting a planning area and prohibits development in the area without the approval of the municipal council. It also prescribes guidelines for the exercise of the council's discretion. As soon as the municipal plan is in effect and until permanent controls implementing it have been adopted, as required by the Act, the practice is to require the council to approve only those new developments that conform to the plan.

ii) Use Zoning

Municipalites are empowered to regulate uses of property. The decision to preserve an area does not usually imply a change of use. It is customary to retain the existing zoning designation and simply add extra conditions to protect special features of the area.

D. Interim Control of Demolition and Construction

A delay can occur between the time that a municipality decides to take action on a heritage issue, and the time that such action takes effect. During that delay the municipality needs to maintain the status quo in order to present its intention for being defeated.

All Newfoundland municipalities have the power to designate and protect heritage properties. The **City of St. John's Act** provides for the withholding of a demolition permit for any building for a period of up to 90 days. If the building is designated within that time, the permit stands, refused; if not, the permit may be issued. The City has established a Heritage Area Bylaw and Heritage Area Committee. Other Newfoundland municipalities do not have this specific right to withold permits pending designation; and it is not clear whether the court would uphold a bylaw which created a regulatory framework for interim controls. Such an approach to interim controls has, however, been upheld for new construction; consequently, it is possible that comparable framework respecting demolition would be upheld.

E. Provincial Intervention

The Minister of Municipal Affairs under the **URPA** has the power to compel municipal councils to adopt plans and bylaws or to conform to and enforce plans and bylaws already adopted. He can compel a municipality to draft a plan amendment; the case is similar for zoning controls.

F. Enforcement

Binding Authority

The applicability of non-federal regulations, including municipal bylaws, to federal and federally-regulated works has been the subject of considerable jurisprudence; they may be applicable in certain limited circumstances.

The provincial government and its agencies are not bound by the provision of a municipal plan or a municipality's zoning regulations.

For municipalities, municipal public works must respect the terms of the plan, similarly, land use regulations must be in strict compliance with the plan. As for bylaws and other regulations, it appears that a municipality will be bound by its own enactments; however, it can formally exempt itself from them.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

The **HOSRA** empowers the Minister of Culture, Recreation and Youth, municipalities, and heritage organizations approved by the Minister to enter into easements or covenants which will bind future owners, even if no other land is benefitted and even if the easement or covenant is positive in nature, i.e., involves expenditures of money.

CHAPTER NINE

NORTHWEST TERRITORIES

1. TERRITORIAL PROTECTION OF PROPERTY

Introduction

Legislation affecting heritage preservation is the **Historical Resources Ordinance** (1970), **Northwest Territories Archaeological Sites Regulations** and **Area Development Ordinance** (1974). Effects of Designations are related to individual sites, surroundings of sites and interim protection. Enforcement is via inspection and binding authority.

A. Environmental Impact Assessment

There is no statute or ordinance specifically dealing with projects threatening existing buildings or providing a public forum to oppose such threats.

B. Legislation

i) Historical Resources Ordinance

This **Ordinance (HRO)** deals with the commemoration of heritage sites. Such commemoration, however, does not have the legal effect of protecting a property against alteration or demolition as exists in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Prince Edward Island and Saskatchewan. Under the **HRO**, the NWT Historical Advisory Board has been established. Members (no fewer than five nor more than ten) are appointed by the Commissioner. The duties of the Board include advising the Commissioner on acquiring, marking and commemorating places and sites of historic significance and the administration, preservation and maintenance of historic places.

ii) Northwest Territories Archaeological Sites Regulations (ASR)

Certain powers have been granted to authorities enabling them to protect endangered heritage property. The **Northwest Territories Act** (1970) empowers the federal cabinet to enact "regulations for the protection, care and preservation of sites, works, objects and specimens of archaeological, ethnological, or historical importance." In 1960, the federal Cabinet enacted the **Northwest Territories ASR**.

The Regulations give a wide definition of archaeological sites and include sites of ethnological or historical importance. It therefore appears that, for legal purposes, such a site can include existing structures and not only ruins.

The Regulations confer certain powers on the federal Minister of Indian Affairs and Northern Development (IAND). On the subject of the protection of buildings against alteration and demolition, those powers are not as clearly worded as those of heritage statutes in the provinces. Instead of stating that the Minister can designate sites which are henceforth protected, section 6 of the Regulations states that "no permit shall be issued for the removal or excavation of any structure that, in the opinion of the Minister, should be permanently preserved in situ (i.e., that location) as an object of scientific or historic interest."

iii) Area Development Ordinance

This **Ordinance (ADO)** empowers the Commissioner of the NWT to designate development areas in any area of the Territories. In a development area, the Commissioner can prohibit the erection, alteration, repair or removal of buildings.

C. Effects of Designations

i) Individual Sites

Property can be protected against demolition under the **ASR**, assuming that the Minister of IAND can prohibit demolition, as outlined above. Demolition could not, presumably, proceed thereafter without ministerial consent. However, the Regulations do not specifically mention alteration of buildings;

they simply state that the site should be specifically preserved. It is not clear whether such a designation would prevent an owner from altering his property beyond recognition, and it is untested in court.

If one assumes the untested hypothesis that the **ADO** can both protect buildings in development areas against alteration and demolition and control new construction, protection would result from a two-step process. First, the Commissioner would have to designate the area as a development area. Secondly, he would have to issue land use controls specifying that demolition and alteration would be subject to his approval.

However, although the **ADO** specifies that an area designated shall not be larger than 150 km^2, nothing says how small it may be; that is, whether it could be small enough to cover only one building and its surrounding property. Although there is no immediate legal impediment to such a designation, it might conceivably be challenged as contrary to the intent of the legislation. Secondly, in the event that the Commissioner did not want to name all the structures in an area for protection, it is also unclear how specific the land use control on demolition would have to be; that is, whether it would need to mention a protected site by name, or whether it could generally foresee protection any historical sites of a definable class. Since the Ordinance has yet to be used for such purposes, neither of these questions have been answered by the courts.

ii) Surroundings of Sites

Neither the **ASR** nor **ADO** give automatic protection to the surroundings of designated sites.

If vistas adjacent to heritage sites are to be protected, they should be specifically included in the area designated under the **ASR**, assuming the Regulations can be used for that purpose. Also, if one assumes that a development area can control demolition, those vistas should be included in the development areas and a statement foreseeing their protection in the subsequent land use controls should also be included.

iii) Interim Protection

If demolition can be averted by designation under the **ASR**, such protection would presumably take place immediately upon designation by the Minister of IAND. Similarly, if sites can be protected within a development area, such protection could take effect immediately upon enactment of the Commissioner's orders.

Unlike the legislation of several provinces - Alberta, British Columbia, Quebec, and Saskatchewan - neither of these mechanisms specifically empowers officials to halt work pending study of an allegedly meritorious site. However, the **HRO** empowers the Commissioner to suspend destruction of any site, designated or undesignated, until such time as an adequate investigation, recording and salvage is made.

D. Enforcement

i) Inspection

Neither the **ASR** nor the **HRO** stipulates that heritage sites can be inspected. Also, the **ADO** does not specify a right of inspection, but it does say that the Commissioner may appoint one or more officers for the purpose of administering and enforcing the Ordinance. This creates an inference, still untested, that these officials can carry out inspections.

ii) Binding Authority

The federal government is usually exempt from land use controls in most parts of Canada, and the status of federally-regulated works is the subject of debate. The exempt status of the federal and Territorial governments is outlined in the **Interpretation Ordinance** (1974) which specifies them to be exempt from the **HRO** and the **ADO**. These governments are similarly exempted from the **ASR** by section 16 of the federal **Interpretation Act** (1970).

2. MUNICIPAL LEVEL

Introduction

Municipal preservation is discussed under planning and its effects, controlling demolition and alteration, and enforcement via binding authority.

A. Planning

i) General

NWT municipalities do not have to consider heritage conservation in the planning process. Unless ordered by the Commissioner, municipalities are not legally bound to prepare a plan.

ii) Effects of Planning

A municipality is not compelled to enact bylaws to put provisions of a plan into effect. In the absence of a statement in the **Planning Ordinance** (1974) to the contrary, an individual proprietor is not bound by a plan unless additional bylaws to enforce a plan are put into effect.

A municipality is partly bound by a plan because its zoning bylaws have to be based upon a plan or upon a survey. However, there is nothing to prohibit a municipality from undertaking public works contrary to its own plan. The Commissioner may intervene to compel the municipality to respect or enforce a plan. Consequently, the adoption of a heritage-oriented plan, or a heritage-oriented amendment to the official plan if it already exists, would be useful in the long term.

B. Controlling Demolition and Alteration

Under section 19(a) of the **Planning Ordinance**, a zoning bylaw may prohibit the alteration, repair, removal or demolition of a building. Thus municipalities can enact zoning bylaws to prohibit demolition.

C. Enforcement

i) General

Municipal officials are empowered to inspect sites, to aid in the preparation of a plan or bylaw and to ensure compliance with the bylaws under the **Planning Ordinance.**

ii) Binding Authority

Municipalities cannot create land use controls which are binding on works of the Territorial government. Thus municipal bylaws do not apply to the Crown -- Territorial or federal governments. Municipalities are partly bound in that zoning bylaws must be based on their plans. The **Planning Ordinance** does not specifically prohibit other bylaws which contradict a plan.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

No legislation exists binding current and future owners. It is possible to draft a contract, although not an easement or covenant, binding current and future owners. The contract can state that the owner will secure the signature of future buyers on the protective agreement. If future buyers refuse to sign then the owner will be liable in damages. This technique often succeeds in assuring that future buyers will respect the contract and thus in protecting a good number of properties for the forseeable future.

CHAPTER TEN

NOVA SCOTIA

1. PROVINCIAL LEVEL

Introduction

Provincial legislation discussed is the **Heritage Property Act** (1980), **Planning Act** (1983), **Special Places Protection Act** (1980) and **Museum Act** (Amended 1972). Two special pieces of legislation related to specific areas are the **Sherbrooke Restoration Commission Act** (1969) and **Peggy's Cove Commission Act** (1962). Effects of provincial designation is related to individual sites, surrouding sites, areas and districts and interim protection. Enforcement is by binding authority. The Downtown Community Development Association is discussed.

A. Environmental Impact Statement

Nova Scotia has not introduced a statutory environmental impact assessment system.

B. Legislation

i) Heritage Property Act

This Act provides for a Provincical Registry of Heritage Property and an Advisory Council on Heritage Property with not less than five or more than 12 members (currently 12). The Advisory Council, composed of both government and non-government officials, may recommend to the Minister of Culture, Recreation and Fitness that a building, streetscape or area be placed on the Registery. Such a recommendation must be accompanied by a notice to the owner. The Minister has between 30 and 120 days, from the date of service of the notice, to register the site. Once registered, the site acquires the title of provincial heritage property. Thereafter, it cannot be substantially altered in exterior appearance or demolished without the approval of Cabinet, which consults with the Advisory Council but has discretion to decide whether or not alteration or demolition can take place. At present there are 36 registered provincial heritage properties.

ii) Planning Act

Unlike the 1969 **Planning Act**, special development control area provisions are not found in the 1983 **Planning Act**. Section 7 of the 1983 Act does, however, provide for provincial land use policies and statements of policy with respect to any or all of the following:

- industrial, commercial, institutional, educational, cultural, recreational and health facilities including priority areas for their location;

- any other matter that affects the land resources of the province.

iii) Special Places Protection Act

This Act replaces the **Historical Objects Protection Act** of 1970 and is administered by the Nova Scotia Museum for the Minister of Education. Its purpose is to provide for the preservation, protection, regulation, exploration, excavation, acquisition and study of archaeological and historical remains and palaeontological sites which are important to the province's human history.

Based on recommendations of the 11 member Special Places Advisory Committee, the Minister of Education with approval of the Lieutentant-Governor in Council, may designate protected sites. This committee is composed of members from public and private agencies.

iv) Museum Act

Under Section 7 of Chapter 211, the Board of Governors of the Museum, chaired by the Deputy Minister of Education, may receive, acquire, hold, preserve, maintain, reconstruct, restore and manage property of historical, architectural and cultural interest. The Board may also identify, mark, preserve, and develop provincial sites of significance to human history.

v) Legislation Governing Particular Areas

There are two examples of special legislation enabling the province to exercise tighter controls over heritage areas.

Under the **Sherbrooke Restoration Commission Act**, this Commission, largely appointed by the Cabinet, is given the task of recommending and administering ministerial regulations for the restoration and development of the Sherbrooke Planning Area. Regulations respecting the destruction or demoliton of buildings are specifically authorized.

The **Peggy's Cove Commission Act** creates a similarly appointed Commission, part of the Department of Municipal Affairs, whose purpose is to preserve the unique scenic beauty, character and atmosphere of the area. The Commission's powers include the ability to make bylaws designating areas in which it shall be unlawful to erect, construct, alter, reconstruct, repair or maintain designated types of buildings. It can also pass bylaws in respect of any matter which it deems necessary to the carrying out of its purpose. While unsympathetic construction and alteration can clearly be prevented, no mention is made of demolition. The fact that the Commission has such tight controls on replacement buildings and uses was apparently expected to discourage the destruction of existing structures.

C. Effects of Provincial Designation

i) Individual Sites

The **Heritage Property Act (HPA)** and the **Special Places Protection Act (SPPA)** protect registered properties from unauthorized alteration and demolition.

ii) Surrounding Sites

Nova Scotia legislation does not give automatic protection to the surroundings of designated sites. Thus neighbouring construction may block the view of a heritage site. Vistas to a site can only be protected if included in the designating order.

iii) Areas and Districts

Under the **HPA**, a provincial heritage property can be a building, streetscape or area.

iv) Interim Protection

The **HPA** provides that once the Minister has served notice of the Advisory Council's recommendation to register a building, streetscape or area alteration or demolition is prohibited for 120 days without ministerial consent. Under the **SPPA**, the Minister must inform a private land owner not less than 30 days prior to designation. The owner may comment on such a designation within a period of time specified by the Minister.

D. Enforcement

Binding Authority

Legislation does not affect federal lands or federally-regulated land such as railway property.

The **Planning Act** does not stipulate that the Crown is bound by this Act. However, the **HPA** and the **SPPA** bind the Crown.

Municipalities and non-government owners are bound by these Acts.

E. Downtown Community Development Association (DCDA)

The DCDA was formed in August 1983 to assist all communities involved in downtown revitalization and to work with the Department of Development's Mainstreet Program. This Program began in 1978 and was designed to refurbish, revitalize, and promote downtown commercial areas. The Association has a five member Board of Directors representing the five regions of the province.

2. MUNICIPAL LEVEL

Introduction

The two main purposes for conserving structures and streetscapes are first, to protect valuable buildings against demolition and unsympathetic alterations and, second, to maintain the integrity of the scene by discouraging unsympathetic infill construction. The latter purpose is particularly important in the preservation of streetscapes and areas.

The **HPA** is the main vehicle for heritage-oriented initiatives. Municipalities are subject to the **Planning Act**, the **Municipal Act** (1967) and the **Towns Act** (1967). These statutes can occasionally be employed on behalf of the built environment. The three cities of Halifax, Dartmouth, and Sydney have their own city charters.

Municipal planning is discussed under planning and the **Planning Act**, controlling demolition and construction, interim control through demolition, provincial intervention and enforcement through binding authority.

A. Planning

i) General

Under the **Planning Act**, there are several provisions which may have indirect impact on heritage preservation. For example, Section 38 allows for statements of policy with respect to (i) educational, cultural, and health facilities. Section 41 refers to background studies in a number of areas including the character of the planning area and the protection or enhancement of the amenities within it. Also, through the land use bylaw, Section 53(3)(j) allows for the regulation of architectural design or external appearance of structures.

ii) Planning Act

The local planning instrument is known as the municipal planning strategy. The municipal council must give notice of its intention to adopt the proposed strategy and consider any written objections to it. Following adoption by the council, the plan comes into effect upon the approval of the Minister of Municipal Affairs. Once it has adopted a plan, the council must pass a land use bylaw for the purpose of carrying out the intent of the plan, since all existing zoning is automatically repealed upon the minister's approval of the plan, the new zoning controls will have to be prepared contemporaneously with the plan.

The implementing zoning, and not the local strategy itself, will be enforceable against private owners. However, the municipality itself is prevented from undertaking any development that would be inconsistent with the strategy. In addition, no land use bylaw can be passed that would be contrary to the plan. As in the case of regional plans, it is important that plans provide for the preservation of the community's heritage.

iii) Controlling Demolition

Municipalities have powers that resemble those of the provincial government. They can have their own registry of heritage property, with their own heritage advisory committee.

Once registered, the building, streetscape or area shall not be substantially altered or demolished without the approval of the municipality. Specifically, where an application is refused after one year from date of application, the applicant can proceed with the alteration or demoliton provided it is not undertaken more than two years after the date of application.

B. Controlling Construction

i) General

The **Planning Act** contains special provisions for the control of development in comprehensive development districts. In such districts, development inconsistent with the purposes of the district is prohibited and no development permit can be granted without the council's approval.

ii) Use Zoning

Municipalities are empowered to regulate uses of property. The decision to preserve an area does not usually imply a change of use. It is customary to retain the existing zoning designation and simply add extra conditions to protect special features of the area.

C. Interim Control

Control of Demolition

A delay can occur between the time that a municipality decides to take action on a heritage issue, and the time that such action takes effect. During that delay the municipality needs to maintain the status quo in order to prevent its intention from being defeated.

The **HPA** does not answer the following questions. Does the owner of a yet unregistered property, who has received no notice, acquire a vested right to a demolition permit as soon as he applies for it? Is there anything which a municipality can do to defeat this right and protect the property? On the other hand, a municipality is required to postpone all development that might be inconsistent with the proposed bylaw or bylaw amendment for a period of 120 days following the giving of notice of its intention to pass the new bylaw. Whether this provision can be used to delay demolition still depends on the interpretation of development.

D. Provincial Intervention

Under the **Planning Act**, it is possible to have a municipal planning strategy without a land use bylaw provided that the strategy does not attempt to deal with land use matters. Where provincial land use policies and/or regulations are in effect, and where municipalities have strategies and/or bylaws in place, such documents must be in conformity. This might require both strategy and/or bylaw amendments.

E. Enforcement

Binding Authority

The applicability of non-federal regulation, including municipal bylaws, to federal and federally-regulated works has been the subject of considerable jurisprudence; they may be applicable in certain limited circumstances.

The provincial government and its agencies are not bound by the provision of a municipal planning strategy or a municipality's zoning regulations. However, the **HPA** and the **SPPA** do bind the Crown and likely bind municipalities enacting bylaws under these Acts.

Are municipalities bound by their own strategies or bylaws? In the case of plans, municipal projects/undertakings must respect the terms of the strategy. Similarly, land use regulations must be in strict compliance with the plan. As for bylaws and other regulations, it appears that a municipality will be bound by its own enactments; however, it can formally exempt itself from them.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

The **HPA** and the **SPPA** empower the Minister and municipalities to enter into easements or covenants which will bind future owners.

CHAPTER ELEVEN

ONTARIO

1. PROVINCIAL LEVEL

Introduction

Provincial heritage planning is generally conducted under the environmental impact assessment process. Legislation reviewed is the **Environmental Assessment Act** (1980), **Heritage Act** (1974), **Public Lands Act** (1980) and **Planning Act** (1983). Programs of various provincial ministries are discussed related to the **Planning Act** and applicable to municipalities.

A. Environmental Impact Assessment

Ontario has adopted a variant of the environmental impact assessment procedure under the **Environmental Assessment Act (EAA)**. This Act and its regulations require the preparation and submission of reports containing an assessment of the environmental impact of proposed developments. These reports, called environmental assessments, must be filed by provincial government ministries and agencies, municipalities and conservation authorities. The Act also specifies factors to be included in the reports, including a description of the proposed undertaking, its positive and negative effects on the environment and the means which are available to mitigate the adverse effects. This requirement is important for heritage conservationists because the Act's definition of environment includes the built environment: '...the social, economic and cultural conditions that influence the life of man or a community', as well as '... any building, structure, machine or other device or thing made by man'. The assessment must also make an evaluation of the advantages and disadvantages to the environment of an undertaking, the alternative methods of carrying out the undertaking and the alternatives to it.

Undertakings which are subject to the Act can be exempted by Cabinet regulation. Exemptions have been made in a number of important areas. For example, projects conducted by the Ministers of Correctional Services, Colleges and Universities, Education, and Health are exempt from the law except when a project is carried out on their behalf by the Minister of Government Services. However, most projects affecting buildings are carried out by the Ministry of Government Services. A project is scrutinized by the provincial ministries and agencies having a mandated concern with the undertaking or its alternatives. Their comments are incorporated into a government review. The preparation of the review is coordinated by the Environmental Assessment Branch of the Ministry of the Environment.

Both the assessment and review are available for public inspection. Any person may then comment in writing on the environmental assessment, the government review and the project and may also require a public hearing by giving written notice to the Minister. The hearing, if called, is held before the Environmental Assessment Board. The Board may rule on the adequacy of an assessment and whether the undertaking should proceed If the assessment is found to be inadequate, or if shortcomings are detected in the proposed undertaking, the Board may decide that the project should not proceed at that time. The Board may also approve the project with or without conditions. The decision of the Board is not immediately binding. There is a 28 day delay in which the Minister of the Environment, with the approval of the Cabinet, can vary the decision in whole or in part or require that a new hearing be held. Thereafter, the Board's decision becomes legally binding on all parties. This system differs from the American system in that citizens have no clear right to challenge the Board's decision in the courts. The Minister's decision is also unlikely to be challenged.

Regarding heritage preservation, the pattern has emerged that heritage-oriented environmental impact assessments deal initially with archaeological resources, not with historical resources. Consideration for threatened historic buildings usually comes later. The Ministry of the Environment currently regards the destruction of the structural environment by demolition as outside the application of the Act where the exemption provided by Section 4 of **Ontario Regulation 293** has application. The Regulation, proclaimed in October, 1976, substantially limits, in terms of heritage preservation, the application of the Act passed in 1975.

Ontario Regulation 293 states that when an undertaking was started prior to 1975, the date of the Act, its 'retirement' is exempt from the relevant provision of the Act. The demolition of a public building built prior to 1975 is really the retirement of the building and the demolition of it may disregard the procedures set forth in the Act. No other jurisdiction using environmental assessment possesses a comparable provision. As long as this provision is in effect, it is possible to use the **EAA** to investigate the threat to public buildings only when such threat is part of a larger project which is itself subject to the Act, for example, certain major redevelopment schemes.

It should be noted that Cabinet may, upon request, designate a project as being subject to the **EAA**, not withstanding the fact that the project may not, at present, be subject to the Act.

B. Legislation

i) Heritage Act

Until 1974, it was possible for a provincial Minister to designate historic sites under the **Archaeological and Historic Sites Protection Act** (1970). Such sites could not be altered or excavated without ministerial approval. This power was repealed in 1974 with passage of the **Heritage Act**, thereby leaving Ontario as the only province, aside from Nova Scotia, without a provincial mechanism to protect historical sites. Thus, the responsibility for preserving heritage rests soley with municipalities who have only 270 days during which negotiations may be held with owners of historic properties. After this time, other measures and legislation must be used. As the Act stands, the only buildings or structures eligible for provincial protection are ruins, burial mounds, petroglyphs and earthworks. However, outside of municipal boundaries, no protection is afforded to historical buildings under the **Heritage Act**.

Under the **Public Lands Act**, lands owned by the Crown are administered by the Ministry of Natural Resources. Historical buildings related to mining and lumbering, activities which occur on Crown land, are located here. The

Act, however, contains no provisions related to the preservation of such historical buildings. In fact, it is the practice of the Ministry to demolish buildings no longer in use. However, the mine site at Gold Rock in Northern Ontario and Cobalt's Northern Ontario Mining Museum are exceptions.

ii) Provincial Interest in the Planning Process

Planning and land use control are primarily a municipal responsibility, heritage controls are also included, as defined under the **Planning Act**. The province is interested in ensuring that land use planning matters recognize the need to consider issues and concerns which are important to large segments of the population throughout Ontario. To this end, the new 1983 **Planning Act** introduced the concept of provincial policy statements issued within a legislative framework. Although none have been published as yet, statements on foodlands, aggregates, environmental land use compatibility and floodlands are under preparation. Through this new provision, a proposed guideline on heritage conservation, now being considered by the Ministry of Citizenship and Culture, may form the first step towards an eventual policy statement related to preserving the built environment.

2. MUNICIPAL LEVEL

Introduction

The two main purposes behind any action to conserve structures and streetscapes are first, to protect valuable buildings against demolition and unsympathetic alteration and, secondly, to maintain the integrity of the scene by discouraging unsympathetic infill construction. The latter purpose is particularly important in the preservation of streetscapes and areas.

Three statutes empower municipalities to exercise limited protective powers for buildings and streetscapes: **Heritage Act**, **Planning Act** and **Municipal Act** (1970).

Topics discussed are general planning under the **Planning Act,** followed by ministry planning programs for the Ministries of Municipal Affairs (MMA) and Citizenship and Culture (MCC), Government Services and Transportation and Communications. Under MCC, the Building Rehabilitation and Improvement Campaign (BRIC) objectives are listed and the four BRIC components are discussed - Corporate Sector Grants, Designed Property Grants, Heritage Conservation District Funds and Community Heritage Funds. The objectives of the Ontario Heritage Foundation are listed.

Municipal control of demolition and alterations are discussed for individual sites, heritage conservation districts and demolition control areas. Other topics are controlling infill construction, interim control of demoliton and construction, provincial intervention through plans and zoning bylaws, and enforcement.

A. Planning

A basic objective of the **Planning Act** is increased local responsibility in municipal planning. To accomplish this, the Ministry of Municipal Affairs has broadened delegation of the Minister's authority so that more responsibility for land use planning is exercised at the local level, including heritage conservation.

MMA delegates authority to qualifying upper-tier municipalities on request, and extends this to include cities outside regional municipalities and separated towns.

With expansion of the Minister's powers, the Ministry accepts that the actions of a lower level of government should be supervised only to the extent required to protect the interests of the higher level. Consequently, the province has taken steps to define its interests in local land use planning. By including a general statement of provincial interests in section 2 of the **Planning Act** and by issuing planning guidelines, as well as provincial policy statements, the Ontario government intends to achieve this end. Accordingly, municipalities with delegated authority are able to exercise it with greater certainty of the interests of the provincial government.

B. Ministry Planning Programs

i) Ministry of Municipal Affairs

The MMA encourages and facilitates community improvement and renewal activities through assistance to municipalities and the private sector pursuant to Section 28 of the **Planning Act**. Through its Programs for Renewal, Improvement and Development (PRIDE), MMA provides consultation advisory support, education, information, and financial assistance. To qualify, a municipality must have a policy relating to community improvement in its official plan. PRIDE includes the Ontario Neighbourhood Improvement Program (ONIP) and the Commercial Area Improvement Program (CAIP) which has assumed the functions of the Main Street Revitalization Program and the Downtown Revitalization Program. Similarly, other local and regional municipalities will enjoy the benefit of knowing the province's position on key resource management and planning issues as they prepare their own official plans and zoning bylaws. Also, day-to-day planning decisions should be facilitated as a result of the policy direction from the provincial level of government.

ONIP assists municipalities in revitalizing deteriorating residential neighbourhoods which are potentially stable and are occupied by low and moderate income households. Costs are shared 50/50 between the province and municipality.

The purpose of the CAIP program is to assist municipalities to upgrade older commercial districts by providing grants and loans for municipal services, parking, aesthetic and economic improvements. As a pre-requisite for eligibility, every municipality must have an approved Official Plan under the **Planning Act** with policies relating to community improvement. There are no population limits. The program has an objective to encourage conservation of buildings and areas of historic significance. Historic commercial buildings are more likely to be preserved if their economic viability is enhanced.

The MMA also administers the **Municipal Act**. Section 217 permits municipalities to designate Business Improvement Areas (BIAs). These BIAs are a self-help mechanism to assist local business and retail communities upgrade and promote commercial and shopping districts. Here again, commercial heritage structures are indirectly benefitted.

ii) Ministry of Citizenship and Culture

Subjects discussed as administered by MCC are the Building Rehabilitation and Improvement Campaign (BRIC), and Community Facilities Improvement Program (CFIP), and the Ontario Heritage Foundation.

BRIC

BRIC is a series of grant programs providing financial assistance for architectural conservation and is making $8.5 million available in grants over a five-year period, 1982-1986. This complements the work of the Ontario Heritage Foundation and various Wintario programs that provide assistance for the conservation of structures considered to be of particular importance to the province. BRIC supports individual projects of local value as well as those within Heritage Conservation Districts.

BRIC objectives are to:

- provide assistance to locally significant heritage properties, including industrial, commercial and residential.

- encourage and expand investment from the private sector.

- encourage improvements to heritage properties and Heritage Conservation Districts.

- provide funds to places where little conservation activity has previously occurred.

- promote an increased awareness of heritage conservation through an educational program and the provision of technical information.

BRIC is composed of four components: Corporate Sector Grants, Designated Property Grants, Heritage Conservation District Funds and Community Heritage Funds.

a. Corporate Sector Grants

These grants are available for the conservation of privately owned commercial or industrial properties that have been designated under the **Heritage Act**. Grants are made on a discretionary basis up to a maximum of 50% of eligible costs. Each project must involve a minimum expenditure of $10 000 on eligible heritage items.

To be eligible for a grant, a building must have been constructed for commercial or industrial purposes, or have been in such use for at least 50 years. Its current use must still be commercial or industrial, at least in part. Exclusively residential use is acceptable if the building contains three or more dwelling units.

Any work that conserves and enhances the historic fabric of a building is eligible for grant assistance. The major thrusts of this work should be to ensure the structural stability of the building, to keep it weathertight and to conserve its heritage value.

These grants are given in exchange for a heritage easement to be held by the municipality. An easement is a legal agreement registered on a property's title and designed to protect the heritage features of that property.

b. Designated Property Grants

Grants have been established to enable municipalities to assist the conservation of properties designated under the **Heritage Act**. Grants to a maximum of $2 000 are available through the municipality, but must be matched on a 50/50 basis with the owner.

Upon satisfactory completion of the work, the municipality reimburses the owner. Twice a year, MCC in turn reimburses the municipality for all grants paid out.

Any work that conserves or enhances elements specified in the reason for designation is eligible for grant assistance. This can include the conservation or restoration of significant architectural features.

Work that does not materially improve the heritage value of a building - routine maintenance, landscaping, modern additions, and so on - is not eligible.

c. Heritage Conservation Districts Funds

A Heritage Conservation District is an area designated under Part V of the **Heritage Act** in recognition of its particular architectural or historical character. A detailed plan is prepared for each district to define the area's qualities, make recommendations for their enhancement, and provide policy directions and guidelines. An example is Hamilton's James Street North District.

BRIC funds are available to assist in the implementation of the proposals set forth in the District Plan. A municipally administered fund, created by joint provincial and municipal contributions, may be used to aid the repair, or restoration of the exteriors of heritage buildings wthin the district, and for the conservation and improvement of its public properties and streets. Normally, at least half of this fund is available for grants to private properties.

To qualify for these funds, a municipality must have:

- a Heritage Conservation District designated by municipal council and approved by the Ontario Municipal Board.

- a Heritage Conservation District Plan endorsed by MCC.

- a Local Architectural Conservation Advisory Committee (LACAC). A LACAC acts as an advisory body to the municipal council. Its prime responsibility is to recommend to council heritage properties deserving of designation under Part V of the **Heritage Act**. Over 1 500 individual properties have been designated by more than 130 LACACs.
- a commitment to finance its share of the Heritage Conservation District Fund and to assume all administrative costs related to this Fund.

If the municipality sells a heritage property which has been acquired under the program, it must obtain an executed heritage conservation easement from the proposed purchaser as a condition of sale. If any property acquired under the program is sold during the period of the legal agreement, the municipality must reimburse the Fund with the original fund contribution toward that property's purchase plus interest at a rate of 10% per annum, compounded annually. If the property is sold in the period between the expiration of the legal agreement and 20 years from the date of the agreement, the municipality must reimburse the province with the province's contribution towards the purchase price of that property, amortized on a straight-line basis.

d. Community Heritage Funds

Seed money will be provided for municipalities wishing to establish heritage funds. A portion of the funding will come from BRIC, with the remainder being raised from local sources.

The monies are used to establish revolving funds for the purpose of investing in architectural conservation projects that have a potential of returning money to the fund. Activities may include acquisition, conservation, and resale of heritage properties and making loans for work on designated properties.

CFIP

Amongst other uses, this program is utilized for the conservation of heritage buildings. Such buildings must be either owned or leased by the applicant for a minimum of 20 years. Up to 50% of the eligible costs may be provided.

Ontario Heritage Foundation (OHF)

Under Part II of the **Heritage Act**, the OHF Board of Governors consists of not fewer than 21 private citizens. Its objectives are to:

- advise and make recommendations to the Minister of Citizenship and Culture on any matter relating to the conservation, protection and preservation of provincial heritage.
- receive, acquire and hold property in trust for the people of Ontario such as the Hudson's Bay Company Staff House at Moose Factory donated by the Company in 1977.
- support, encourage and facilitate the conservation, protection and preservation of provincial heritage.
- preserve, maintain, reconstruct, restore and manage property of historical, architectural, archaeological, recreational, aesthetic and scenic interest. Examples are Dundurn Castle, Hamilton and Bethune-Thompson House, Williamstown.
- conduct research, educational and communications programs necessary for heritage conservation, protection and preservation.

iii) Ministry of Government Services (MGS)

Heritage Properties Program

The Heritage Properties Program began in 1981 as an agreement between MGS and MCC. It utilizes available resources to:

- identify and evaluate those properties of potential heritage significance which are owned by the province and provide accommodation for ministries and agencies, which are part of the MGS' active Accommodation Program and maintain a listing of such properties.

- manage real property within the active Accommodation Program to promote the conservation and continued use of the listed heritage properties.

- implement a program of architectural conservation for those properties placed in the Heritage Properties Program.

- recognize local and regional programs and policies when making decisions regarding the future of a listed heritage property.

- attempt to provide for the continued conservation of a listed heritage property which may be sold by the government.

The responsibilities for the implementation of the Heritage Properties Program rest primarily with MGS which manages the properties in the Accommodation Program and MCC which acts as the government's expertise in matters relating to heritage conservation. Examples include court-houses (Brockville) and schools of agriculture (Guelph).

iv) Ministry of Transportation and Communications (MTC)

Heritage Road Bridges Policy

In July 1982, Deputy Ministers of MTC and MCC signed an agreement regarding the conservation of heritage bridges. Although the majority of listed bridges are under municipal jurisdiction, a number are in provincial ownership. The principles and procedures of the listed bridge program concerning evaluation, nomination and conservation strategies apply equally to bridges in municipal and provincial ownership.

In other aspects, however, principles and procedures differ with listed bridges in provincial ownership. The funding of conservation work for a listed bridge in provincial ownership by necessity is the responsibility of MTC. The Ontario Heritage Foundation does not fund conservation work for provincially owned property.

In addition, MTC has adopted a comprehensive system of environmental assessment. Major modifications to, or replacement of, provincial road bridges are subject to the requirements of the **Environmental Assessment Act**, either as specific assessments or as a class assessment. Irrespective of the administrative process of planning, design and assessment adopted by MTC, listed bridge status must be considered as an important factor in the process of environmental assessment.

Accordingly, both Ministries have agreed as a matter of policy that:

- MTC shall have regard to listed provincial bridges (over 40) in its undertakings subject to the **Environmental Assessment Act**.
- MTC will circulate to MCC all reports prepared for a specific or class environmental assessment where the undertaking affects a listed provincial bridge.
- MTC give special consideration to those conservation strategies identified in the heritage bridge program in proposing and evaluating mitigation measures where a listed provincial bridge may be adversely affected by an undertaking.

Of approximately 15 stone-arch bridges that remain in Ontario, only two are largely intact: in Packenham and Lyndhurst. The Packenham bridge is being restored; the other is being discussed. Concerning covered wooden bridges, only one remains in Ontario in West Montrose, about 15 kilometres north of Kitchener.

C. Controlling Demolition and Alterations

Municipalities can control demolition and alteration of specific properties via three mechanisms: under the **Heritage Act**, heritage conservation districts and thirdly, under the **Planning Act**.

i) Individual Sites

In these sites, a municipality passes a bylaw designating the property under the **Heritage Act**. This does not necessitate a change in the official plan. However, it does require consultation with the Local Architectural Conservation Advisory Committee (LACAC), if one exists.

The next step in designation is a notice of intent passed by the local council and served upon the owner. As soon as notice is given, controls on alteration and demolition come into effect. The owner can object to the Conservation Review Board, but the Board's decision is not binding. Rather, it simply makes a recommendation back to the council, which has the discretion to decide whether or not to proceed with the designation. If a municipality decides in the affirmative, it passes a bylaw to designate the structure.

All alterations to a designated site must be approved by council which may refuse such permission indefinitely. Ontario municipalities, unlike their counterparts in several other jurisdictions -- Charlottetown, St. John's, Winnipeg and Vancouver -- cannot refuse demolition permits indefinitely. Instead, the municipal council is given 90 days in which to decide whether it favours demolition. If it decides against demolition, it can refuse to issue a demolition permit for a further period of 180 days. At the end of that delay, the building may be demolished notwithstanding the council's opposition. The right to demolish is, then, easier to obtain than the right to alter, since it would appear that the maximum delay on demolition is 270 days. This delay is shorter than that provided by Quebec, the only other Canadian province with a temporary, as opposed to permanent, municipal demolition freeze. Quebec's freeze can last one year.

ii) Heritage Conservation Districts

Buildings designated in such districts are subject to approximately the same controls as individual buildings. However, the **Heritage Act** imposes more formal preconditions upon creation of such districts than any other Canadian province. Thus district designation is less frequently used than individual designation.

District designation must be approved by the Ontario Municipal Board (OMB). The procedure is as follows. MCC recommends that the municipality pass a bylaw appointing a LACAC. Secondly, official plan provisions are a prerequisite to the designation of a heritage conservation district. Consequently, if a municipality has no official plan, it must bring one into existence. This official plan must include general heritage policy statements which indicate the municipal council's acceptance of heritage conservation in principle and its commitment to act in order to protect the heritage of the municipality. If the municipality already has an official plan which does not mention heritage, the official plan must be amended accordingly. Thirdly, the Planning Board will prepare the official plan statement. Under the provisions of the **Planning Act**, the Planning Board will be required to call public meetings and elicit public participation. Fourthly, the official plan or official plan amendment is submitted for the review and approval of the Minister of Municipal Affairs in consultation with MCC.

One might infer that a council could then proceed immediately to the passage of a bylaw designating a heritage conservation district. However, the OMB would not likely approve such a designating bylaw unless even more planning had been done, since MCC recommends a second plan studying a specific area. This secondary plan or heritage conservation district plan would go into much greater detail than the official plan. The preparation of such a plan requires that two preconditions be met. Firstly, the LACAC would have to be consulted. Secondly, the municipal council would have to pass a bylaw authorizing the study. In this case, however, there is no further review of the bylaw itself at the provincial level.

This new plan must be referred to MCC. No review or approval by the Minister of Municipal Affairs is necessary. Once such approval is given, the plan, adopted by the council, is implemented by bylaw designating the area as a heritage conservation district. The bylaw itself does not come into force without the prior approval of the OMB and is therefore subject to standard procedures for bylaw review by the OMB.

Once the area has been designated, the owners of all buildings in the heritage conservation district must apply for municipal permission for external alteration, construction and demolition. As is the case for individually designated buildings, permission for alterations can be refused indefinitely, but refusal to permit demolition cannot exceed 180 days.

It is important to note that a building cannot be treated as having been designated both individually and as part of the heritage conservation district: it must be either one or the other. A designated building which happens to be in a designated district is subject to the rules applicable to individually designated buildings, and not to the rules of heritage conservation districts since the consequences of these two forms of designation are slightly different.

In the first place, the interior of a building can be protected if the building was designated individually, but not if it was designated as part of a district. Secondly, a person who applies unsuccessfully for alteration or demolition of a building can appeal to the Conservation Review Board if the building was individually designated, whereas an appeal is to the OMB if the building was designated as part of a district. The latter carries more weight, insofar as it is binding upon the municipality. Thirdly, an individually designated site whose building has been legally demolished is henceforth free of the controls of the **Heritage Act**, but a site within a heritage conservation district remains subject to the rules of infill construction under the Act even after the building has been demolished.

iii) Demolition Control Areas

Partial protection of areas can also be provided by the **Planning Act** under which municipalities can declare demolition control areas. A municipality is granted emergency powers if it considers a building a public hazard. Thus the municipality can demolish the building with costs being borne by the owner. The effect of such a designation is to prohibit demolition of residential dwellings in the area unless new construction on the site is substantially completed within two years after the demolition. This designation obviously does not protect properties from the demolition which accompanies redevelopment. However, it does protect properties from demolition which is carried out for parking lots or for purely speculative or tax purposes.

D. Controlling Infill Construction

The general philosophy of land use controls in Ontario is that the possessor of land can do virtually anything with his property unless specifically prohibited by regulations, usually zoning bylaws. In some exceptional parts of Ontario the situation is the reverse and the possessor can do virtually nothing unless specifically authorized. This is the case along the Niagara Escarpment, and in certain other locations. Those are the locations regulated under Section 35a of the **Planning Act**. Section 35a is not exactly analogous to development control in some other jurisdictions. The discretion which municipalities can exercise, for example, is limited.

Under Ontario's interpretation of development control, a municipality which has an official plan in effect can declare its territory or a part thereof to be a development control area. Once a development control area is in existence, all development and redevelopment in it is conditional upon the applicants meeting certain standards. These standards are not, however, as precisely set out as is customary with bylaws, and consequently give more flexibility and discretion to municipal officials in accepting or rejecting applications for development. Appeal is to the OMB. The utility of s. 35a for heritage areas is, however, limited. The subjects which can be regulated under this section do not include the bulk, height and design of buildings.

E. Interim Control of Demolition and Construction

Some sites face an immediate threat such as if the designation process is long and complicated, there is a chance that the site will not be saved. The **Heritage Act** provides for the issuance of a stop order only under Part VI, which deals with conservation of resources of archaeological value. However, a form of interim protection does take place when a notice of intention to designate a building of historic or architectural value is served; the designation provisions apply as if the property were already designated under the Act. Also, any permit for alteration or demolition issued by the municipality prior to the notice is void.

F. Provincial Intervention

The Treasurer of Ontario can direct the drafting of plans and the enactment of zoning bylaws. Such intervention takes place by means of a relatively complicated procedure outlined in the **Planning and Development Act** (1973). The Treasurer's capacity under this Act to impose plans upon an area is described by Rogers as follows:

> The **Ontario Planning and Development Act** allows the Treasurer of Ontario by order to establish a development planning area in any part of the province as defined in the order ...
>
> The legal effect of a development plan is to prohibit any improvement to lands or the passage of any bylaw by a council that is in conflict with the plan and the provisions of the plan are to prevail over any official plan or zoning bylaw then in force. The Treasurer can advise a council to submit proposals for the resolution of conflicts between a development plan and any official plan or bylaw. In the event of a failure of council to submit proposals or resolve the conflict, the Treasurer may by order amend the official plan. With respect to bylaws which conflict with the plan, Ministerial zoning orders pursuant to the **Planning Act** may be made that need not conform to an official plan in effect, only the development plan. Alternatively, if a municipality does not have an official plan or has not passed bylaws covering that part of the municipality covered by the development plan, council must prepare and adopt an official plan or pass bylaws that conform to the development plan within the time prescribed by a written notice from the Treasurer with financial grants available towards the cost of such preparation.

Thus, if the Treasurer strongly believes that an area should be the object of heritage conservation efforts, he could order a plan accordingly and, henceforth, municipal bylaws would need to conform to that purpose. The Treasurer can also make Ministerial zoning orders, the equivalent of zoning bylaws, on his own initiative. Consequently, he can regulate bulk and height controls, design controls or any other controls. If there is a conflict with a bylaw already in effect, the order is to prevail. However, this power to make orders extends only to those powers conferred upon councils by s. 35a of the **Planning Act**. The Treasurer could not enact a heritage designation bylaw because the latter falls under the **Heritage Act** and not the **Planning Act**.

Even the most stringent land use controls will not necessarily cause hardship to owners of property for which the controls are inappropriate. Committees of Adjustment are empowered to grant exemptions or minor variances to relieve owners from strict compliance with zoning bylaws, so long as the general intent and purpose of the bylaw and the plan are respected. The committee's decision can be appealed to the OMB.

G. Enforcement

The **Heritage Act** authorizes municipal representatives to inspect buildings which have been individually designated or which have been proposed for such designation. The same inspection powers exist relative to buildings in heritage conservation districts. The **Planning Act** empowers municipalities to agree with county councils to appoint a building inspector for the administration of bylaws passed under s. 38.

The applicability of non-federal regulations, including municipal bylaws, to federal and federally-regulated works has been the object of considerable jurisprudence. These regulations may be applicable in certain limited circumstances. Ontario municipalities are not empowered to subject provincial works to municipal bylaws. In the absence of any statutory authority to the contrary, municipal bylaws do not apply to the Crown.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

The **Heritage Act** empowers the Ontario Heritage Foundation and municipalities to enter into easements and covenants which will bind future owners, even if no other land is benefitted and even if the easement or covenant is 'positive' -- that is, even if it involves expenditure of money. These special agreements are reserved to the Foundation and municipalities. It is probable that the Minister of Citizenship and Culture could also enter into such agreements, as she can exercise the same. Ontario does not provide that these agreements can be entered into directly by other heritage organizations. However, the Foundation or the municipality can assign these agreements to other organizations once signed and registered at the local Land Titles Office. In order to bind future owners, any easement or covenant should be registered at the local Land Titles Office. Examples of heritage conservation easements held by the OHF are: Gooderam Building, Toronto; Gordon Block, Stratford; Sullivan House, Ottawa; and Napanee Post Office.

CHAPTER TWELVE

PRINCE EDWARD ISLAND

1. PROVINCIAL LEVEL

Introduction

Legislation discussed is the **Recreation Development Act** (1974) and the **Planning Act** (1974). Effects of provincial designation involve individual sites, surrounding sites, areas and districts and interim protection. Enforcement is via binding authority.

A. Environmental Impact Statement

There is no statute providing for this procedure.

B. Legislation

i) Recreation Development Act

The PEI Executive Council is empowered by this Act **(RDA)**, on the recommendation of the Minister of Finance and Tourism, to designate protected areas. This appears to confer a clear power to designate areas which will be protected from unauthorized alteration and demolition.

ii) Planning Act

The Minister of Community and Cultural Affairs is empowered by this Act to designate areas for special regulation, as long as these areas are outside the boundaries of incorporated cities and towns. One of these areas is called a conservation zone and can be established for the purpose of preserving "objects of beauty, fossil remains, other objects, animate or inanimate, of aesthetic, educational or scientific interest ..." This section closely parallels the **RDA**, which creates protected areas.

There are, however, some differences. First, the scope of the **Planning Act** is more limited; it contemplates designation in any area except the City of Charlottetown or towns, whereas the **RDA** foresees designation in any area of the province. A second difference can be found in the approach to compensation for designation; discussed later.

Under Part II of the **Planning Act**, the province can also control construction on heritage sites, since it is empowered to govern development of land and building standards.

Jurisprudence is still divided on the interpretation of land use controls, with some decisions holding that such controls cannot be inferred unless the enabling legislation specifically empowers the government. By this reasoning, the **Planning Act** could not be used to control demolition unless the Act referred specifically to demolition control; inferences would be insufficient. Under such interpretation, the **Planning Act** could control only infill construction and not demolition.

C. Effects of Provincial Designation

i) Individual Sites

An area designated as a protected area under the **RDA** or a conservation zone under the **Planning Act** may, presumably, be as large as or as small as the Executive Council desires.

The **RDA** does not outline the method whereby an owner could apply for permission to alter or demolish property within a designated protected area. This method can, presumably, be detailed in the regulations made by Executive Council under the Act.

Similarly, designation of an area under Part II of the **Planning Act** may mean that, if the regulations so dictate, ministerial consent can be prescribed for construction.

ii) Surrounding Sites

PEI statutes do not give automatic protection to the surroundings of designated sites, thus neighbouring construction may block all views of the heritage site. To protect vistas of such sites, it would be necessary to include them in the designation orders.

iii) Areas and Districts

Under the **RDA**, an entire district can be designated a protected area. The **Planning Act** gives the province the right to prescribe geographical boundaries of any conservation zone.

iv) Interim Protection

The **RDA** does not empower the Minister to halt work pending the study of a site. Thus, an endangered building can only be protected by immediate designation.

Similarly, the statute does not provide for other forms of interim protection such as delay of alteration of a site until the site has been assessed and reported upon. The broad protective measures of other statutes are also lacking and the Minister cannot order the suspension of any licence or permit, for example, a construction or demolition permit issued by a municipality.

The **Planning Act** is equally non committal on the subject. It may, nevertheless, be possible to introduce interim protection without statutory amendment as both the **RDA** and the **Planning Act** empower the Cabinet to enact regulations promoting the purposes of the statute. Section 24 of the **Planning Act** comes close to this objective, insofar as it provides for an interim planning policy. Such a regulation could introduce a system of interim protection pending designation. None has been passed to date.

D. Enforcement

Binding Authority

Neither the **RDA** nor the **Planning Act** are binding upon all heritage owners. They do not apply to federal lands or federally regulated land. Provincially, the **RDA** does not bind the Crown, whereas the **Planning Act** does.

2. MUNICIPAL LEVEL

Introduction

The two main purposes behind any action to conserve structures and streetscapes are first, to protect valuable buildings against demolition and unsympathetic alteration, and second, to maintain the integrity of the scene by discouraging unsympathetic infill construction. PEI municipalities may use the **Planning Act.**

Municipal conservation is discussed related to planning and controlling demolition, controlling construction and use zoning, interim control of demolition and construction, provincial intervention, variances and enforcement.

A. Planning

i) General

It is not compulsory that communities consider heritage conservation in their planning process. The **Planning Act** does not compel a municipality to exercise its planning functions. However, once the Land Use Commission approves an offical plan, municipal bylaws must conform.

ii) Controlling Demolition

In PEI, the clarity of municipal provisions controlling demolition depends on the location of the structure in question. If that location is the City of Charlottetown, then the municipal power to control alteration and demolition is clearly enunciated in the **City of Charlottetown Act** (1948). The circumstances surrounding the 1976 enactment of this provision suggest that it was intended to empower the city to designate sites and areas where all demolition would need council approval.

The scope of municipal plans is not entirely clear and is not defined by statute. It is not the plan itself which is binding upon private owners; rather the municipality is required to enact regulations in the case of cities and towns or bylaws in the case of smaller municipalities.

Whether demolition is controlled is still untested. It is clear, however, that municipal regulations can have the same content as provincial regulations. This fact suggests that if the province were empowered to control demolition, then the municipalities would be likewise empowered.

If the courts decide that the **Planning Act** does not sustain municipal demolition control, PEI municipalities other than Charlottetown would be left with less power than some of their counterparts in other provinces. They would enjoy no statutory power to halt demolition either permanently or temporarily.

B. Controlling Construction

i) General

Land in municipal planning areas and joint municipal planning areas in PEI are subject to controls on construction. However, the plans in those areas would apparently need to be accompanied by a more specific set of regulations and bylaws outlining the controls applicable.

As noted earlier, the **Planning Act** does not specifically state the limits of those regulations. They can cover development and building standards. The question arises whether regulations can permit a municipality to control land use on a discretionary basis, or whether precise guidelines would have to be spelled out; the general tenor of Canadian jurisprudence suggests the latter. A second question arises as to whether such regulations can cover all the subjects which are important for a heritage area; that is, even those which are not foreseen in the enabling legislation for zoning such as trees and landscaping, for example.

ii) Use Zoning

Municipalities are empowered to regulate property uses. Usually existing zoning designations are maintained and extra conditions to protect special features of an area are added.

C. Interim Control of Demolition and Construction

Charlottetown cannot delay issuance of a demolition permit to study an undesignated site. Other municipalities are not usually empowered, where no bylaw exists, to refuse to issue a building permit pending bylaw adoption.

D. Provincial Intervention

There is no power of intervention to compel councils to adopt bylaws and plans or conform to and enforce plans and bylaws that have been adopted.

E. Variances

Parties who are dissatisfied with the application of any land use control mentioned in the **Planning Act** may apply for a variance; that is, for a change in the control as it applies to their property. Also, the Minister's decision itself may be appealed to the Land Use Commission.

F. Enforcement

Binding Authority

As noted earlier, the applicability of non-federal regulations including municipal bylaws to federal and federally-regulated works has been the object of considerable jurisprudence; they may be applicable in certain limited circumstances.

Unlike in certain other provinces, municipalities are given no authority to subject provincial works to municipal bylaws. In the absence of any statutory authority to the contrary, municipal bylaws do not apply to the Crown.

Municipalities are bound by their own plans and bylaws concerning municipal public works contained in official plans under the **Planning Act**.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

Under the **Museum Act** (1983), administered by the Minister of Community and Cultural Affairs, the PEI Museum and Heritage Foundation operates as a non-profit organization. Its aims and objectives include the preservation of provincial heritage represented as property of historical, architectural and cultural interest by municipalities.

The Foundation is responsible for the compilation of an inventory of heritage properties and for the encouragement of provincial legislation relating to the field of historical resources. It is governed by a Board of Directors of 13 members appointed by the Lieutenant-Governor in Council and having the power to acquire property, whether by purchase, bequest or otherwise. The Foundation may hold, preserve, maintain, reconstruct, restore, and manage its property. It has the power to dispose of its property and invest its monies.

A heritage bylaw for Charlottetown is in place in which certain properties as well as a particular area are designated. A Heritage Review Board, with representation from PEI Museum and Heritage Foundation, advises City Council on permits for alteration or demolition of properties on these two lists. Also, sineage and accessory buildings in the designated area are reviewed by the Board.

Regarding restrictive covenants, any person owning land who wishes to impose limitations or restrictions on the use to which his land and structures thereon may be put, by himself, his heirs, successors or assigns, or any of them may make application to the Museum for the purpose of entering an agreement with the Museum respecting such limitation or restriction on the use of his land.

CHAPTER THIRTEEN

QUEBEC

1. PROVINCIAL LEVEL

Introduction

Provincial heritage preservation is generally conducted under environmental impact assessment and the **Environment Quality Act** (1972). Administrative procedure for assessing and reviewing environmental impact and public hearing reports are outlined. Under legislation, the **Cultural Property Act** (1972) is reviewed. A detailed description of this Act is contained in Appendix B. Effects of provincial designation relate to individual sites, surrounding sites, areas and districts and interim protection. Enforcement is related to binding authority.

A. Environmental Impact Assessment

Historical resources can be protected via EIA procedures which require inventory and investigation before government financed construction programs can proceed. Under the **Environment Quality Act (EQA)** a project initiator must submit an EIA statement to the Department of the Environment (DOE) for technical review. Such a statement must satisfy the following objectives from a heritage point-of-view. It must be ascertained whether the biophysical, socioeconomic and technological details, and information regarding the population-related aspects, plus the cultural, archaeological and historical aspects of the environment used in the statement are accurate. The methods used to identify and assess the environmental impact are examined and the effectiveness of the means proposed to mitigate effects are analysed. Finally, the proposed surveillance and monitoring program is examined.

Upon approval of an EIA statement by the Minister of the Environment, it is submitted along with an application for authorization to Cabinet or to a ministerial committee for a final ruling. The Lieutenant-Governor in Council transmits the decision to the proponent. However, urban land use planning and development is not subject to the EIA process. Rather the Minister of Municipal Affairs administers such functions, as discussed later.

Concerning public consultation, if the general public considers that the EIA statement does not adequately deal with all of the environmental issues, such as the human and community related aspects, it may request that the Minister of the Environment hold a public hearing. The Minister thus takes the viewpoints of the public into consideration.

Section III of the Regulation respecting environmental impact assessment and review (Order-in-Council 3724-80, December 3, 1980) states that cultural, archaeological and historical heritage may be taken into account in the environmental impact statement. However, the elements that the developer must study are specified in a directive issued by the Minister of the Environment under section 31.2 of the **EQA**. The directive defines the nature and scope of the impact statement. In this context, and in the light of interdepartmental consultation with the Department of Cultural Affairs (DCA), in particular, the directive calls in general for the following points to be studied with respect to heritage. For the area covered by the statement, the developer must identify the known or classified archaeological and historic sites, prepare an inventory of the structures (groups or single buildings) and indicate land showing signs of special use (ranges and so on). Following selection of the project site, the archaeological potential is determined, in order for appropriate action to be identified to protect property and minimize the effects of the development.

After the impact statement is prepared, it is forwarded to the various departments consulted so that they can evaluate the information in it and review the proposed sites in terms of their environmental acceptability. Each department analyses the report in accordance with its particular jurisdiction. The DCA submits its comments to DOE, which coordinates the entire process and forwards any questions to the developer. The developer must provide satisfactory answers before the impact statement is approved for submission to Cabinet.

i) Administrative Procedure for Assessing and Reviewing Environmental Impact

The purpose of the administrative procedure for assessing and reviewing the environmental impact is to define the various steps in the implementation of section 31.1 and subsequent sections of the **EQA**, and the **Regulation** respecting environmental impact assessment and review (RRQ, 1982, Q-2, r 9). This procedure does not apply to projects intended for territories defined in the second paragraph of section 3.19 and in sections 133 and 168 of the Act, for which there are special provisions in the Act and certain Regulations.

The main users of the procedure are the staff of the Environment department's impact studies analysis unit (which helps the Minister and Deputy Minister assess and review environmental impact), the staff of the Bureau d'audiences publiques sur l'environnement (which is responsible for public participation) and anyone else working in a department or agency that may be involved at some point in the procedure. Moreover, the procedure outlines for the developer, or his representative, the administrative route of a request for a government authorization certificate for a given project.

The environmental impact assessment and review procedure is under the jurisdiction of the Minister of the Environment, who is responsible for monitoring and preserving the quality of the environment and advising the government on environmental matters, see section 2 of the Act.

The Minister has assigned a team of specialists, the impact studies analysis unit, to assist him in carrying out the various steps of the procedure. In consultation with the Minister, the team prepares the directive, helps the developer by conducting an assessment of conformity concerning the statement, prepares the notice of conformity and helps prepare the department's decision on the project's environmental acceptability.

The Bureau becomes involved as soon as the impact statement is made public by the Minister of the Environment. It is responsible for providing the public with access to the file and gathering feedback from those who come to consult the available information. Moreover, unless the Minister of the Environment considers an application for a public hearing to be frivolous, he/she shall direct the Bureau to investigate or hold a hearing on the project. The Bureau may also investigate any matter relating to the quality of the environment that is referred to it by the Minister.

There are six steps in the administrative procedure. First, the Minister of the Environment sends a directive on the project, if the project is subject to section 31.1 of the Act. The directive indicates the nature, scope and extent of the environmental impact statement.

Secondly, the developer carries out the studies to prepare the impact statement, according to the Minister's directive. A conformity assessment service is available to developers. The impact statement is then officially submitted to the Minister, along with the other documents making up the file of the request for an authorization certificate. Upon receipt of the official document, the impact studies analysis unit prepares the notice of conformity, by reporting to the Minister concerning the impact statement's conformity, in particular with the Minister's directive.

The third step is the environmental assessment, under which a project's environmental acceptability is analysed, and a decision made.

The Bureau d'audiences publiques sur l'environnement is responsible for the fourth step, which consists of informing the public about the project and encouraging public participation in the decision-making process by providing access to the file concerning the request for the authorization certificate. The public can also obtain all the pertinent information on the statement's technical content and express its views, in particular at public hearings, regarding the impact the project would have on the environment. After a public hearing has been held, the Bureau reports to the Minister on its findings and its analysis thereof.

Fifthly, the Minister of the Environment sends the impact statement and the request for the authorization certificate, along with any other documents considered appropriate, to the government or a Cabinet committee for the final decision.

The sixth and final step involves three types of activity: generally speaking, the Minister of the Environment is responsible for monitoring, while the developer is responsible for supervision and follow-up. Other departments, in accordance with their respective jurisdictions, may also be called upon to ensure compliance with the conditions established by the government.

ii) Submission of the Public Hearing Report

The investigation and public hearing report is drafted by the Commission, and constitutes the Bureau's report. This report, along with the Deputy Minister's report concerning the project's environmental analysis, help prepare the position that the Minister of the Environment presents to the government.

The Bureau's report covers the submissions it has received: memorandums, oral presentations, answers to questions and experts' opinions. The Commission analyses the views of individuals and groups in the light of the data concerning the project and the environment. These observations, analyses and conclusions should enable the Minister of the Environment to evaluate the submissions of individuals, groups and municipalities regarding the project under study.

The public hearing report is made public by the Minister within 60 days of being received, as required under section 6.7 of the Act.

Once the Minister has made the report public, the Bureau must send a copy to the developer, the applicant and anyone else requesting one.

The Bureau must hold a public hearing and make its report within four months of being instructed by the Minister to hold the hearing.

B. Legislation

Cultural Property Act (CPA)

Heritage property is protected by this Act which is administered by the Department of Cultural Affairs. The Minister can designate property for protection against alteration, demolition and unsympathetic construction. However, before designation, the Minister must consult with the 12 member Cultural Property Commission. There are two methods of protection, recognized or identified structures and classified structures. See Appendix B for details.

C. Effects of Provincial Designation

i) Individual Sites

The effect varies between recognized and classified structures. If a building has been recognized by the Minister of Cultural Affairs, no person may destroy, alter, restore, repair, or modify such a structure without giving the Minister and the municipal clerk or secretary treasurer 60 days notice. If there are not objections at the end of this period, proposed changes can be made. Concerning the sale of a building, the owner must give the Minister 60 days notice. If the building is greater than 50 years old, the Minister can purchase the structure for the asking/selling price. The Minister must make his intentions known during the 60 day delay period.

For a classified structure, the period of protection is indefinite, not just 60 days. Thus no changes can be made to such a structure without the authorization of the Minister upon advice of the Cultural Property Commission. As with recognized structures, the Minister has the right of purchase. However, classified structures cannot be sold without Ministerial permission which may be indefinitely withheld. Concerning taxation, the Minister can grant a reduction of up to 50% of municipal taxes for buildings of non-commercial use.

ii) Surrounding Sites

The **CPA** provides automatic protection to the land and buildings within a 152 metre (500 foot) radius of a classified structure. For this zone, one cannot subdivide land, modify the landscape, change the use of the land or exterior appearance of buildings without permission of the Minister of Cultural Affairs upon advice from the Cultural Property Commission. These restrictions do not apply to the surroundings of recognized structures or historic districts.

iii) Areas and Districts

Under the **CPA**, the Minister, following consultation with the Cultural Property Commission, can recommend the establishment of an historic district to a committee of Ministers. Buildings located in an historical district are not subject to the same restrictions as single classified structures. For example, the Minister cannot comment on or stop the sale of such buildings. Also, there is no deduction in municipal taxes for heritage district buildings. The 152 metre zone of protection does not apply.

Within an historic district, some buildings may not be recognized or classified. However, the Minister can declare a group of buildings within a district or the entire district as protected as was done in Gastown and Chinatown in Vancouver.

iv) Interim Protection

A building is protected as soon as the Minister advises an owner of an intention to classify a building. If the building is declared worthy of protection, the owner cannot modify the structure's exterior.

D. Enforcement

Binding Authority

The **CPA** does not apply to federal lands or federally regulated land such as railway property. However, the provincial government is bound by this statute as are municipalities.

2. MUNICIPAL LEVEL

Introduction

There are two main purposes in conserving structures and streetscapes: first, to protect valuable buildings against demolition and unsympathetic alteration and, second, to maintain the integrety of the scene by discouraging unsympathetic infill construction. The latter purpose is particularly important in the preservation of streetscapes and areas.

In Quebec, four statutes define municipal powers regarding demolition, alteration and construction: the **Cities and Towns Act (CTA)** 1964, the Municipal Code, the **Cultural Property Act** and the **Land Use Planning and Development Act (LUPDA)** 1979. In addition to Quebec City and Montreal, which have their own Charters, there are 267 municipalities coverd by the **CTA** and 61 other municipalities covered by the Municipal Code that have a special charter supplementing or modifying some of their powers.

Planning is related to general legislative powers and demolition bylaws. Land use bylaws and zoning are discussed followed by interim building bylaws, provincial intervention, variance, and binding authority enforcement.

A. Planning

i) General

It is difficult to generalize municipal legislative powers related to heritage conservation. There is a range of laws in each of four categories. Firstly, certain laws apply to all municipalities such as Section 49 of the

CPA under which historical districts and areas of protection can be designated. The **LUPDA** also applies to all local municipalities, and to all regional county municipalities except those covered by Division II of Chapter IV of the Act.

Secondly, certain Acts apply to certain municipalities, depending on their legal status. Cities and towns are governed by the **CTA**, while villages, parishes, townships and undesignated municipalities are covered by the Municipal Code.

Thirdly, 330 municipalities have special statutory provisions contained in charters, aimed at complementing or replacing sections of the **CTA** or Municipal Code. These special measures have virtually no effect on the municipalitie's authority to control land use, which remains subject to the **LUPDA**.

Fourthly, owing to the size of some municipalities and their area populations, and the concern for better distribution of the costs of certain public services, among other things, the Quebec government has created three regional communities: the Quebec City and Montreal urban communities, and the Outaouais regional community. These communities are considered regional county municipalities under the **LUPDA**. The municipalities within these communities are governed by the Acts creating the communities, and by their charters, the **CTA** or the Municipal Code, and by the **LUPDA**.

Each of the 94 regional county municipalities, established under the **LUPDA**, is required to prepare and adopt a development plan for its territory. The identification of areas of historical, cultural, aesthetic or ecological interest is a mandatory part of the development plan. After the plan is adopted, the local municipalities must adopt or modify their own planning programs and bylaws (zoning, subdivision, construction) to comply with the development plan. One aspect of the planning program may be the designation of zones to be renovated, restored or protected.

ii) Demolition Bylaws

Under the **CTA** and the Municipal Code, any municipality may adopt a bylaw prohibiting the demolition, for up to 12 months, of any immovable that might be cultural property or that is on land that might be an historic or natural district under the **CPA**. However, the municipality must send a request to the Minister of Cultural Affairs within 15 days of adopting such a bylaw, in order for the immovable to be recognized or classified as cultural property or for the area identified to be designated as an historic or natural district. In contrast to the policy in British Columbia, Winnipeg and St. John's, this temporary protection in Quebec applies only to demolition.

B. Land Use ByLaws

i) General

Under the **LUPDA**, municipalities have various powers with respect to zoning, construction and subdivision. However, these powers are linked to the planning program, which determines the municipality's main development aims and the primary uses of its land.

ii) Zoning

The **LUPDA** gives municipalities the power to create bylaws on such aspects as land use, density, the size and height of structures, architecture, outside appearance and exterior finish. The decision to protect an area or a structure does not generally lead to a change in use. However, it may sometimes be necessary to modify or supplement existing bylaws with provisions to preserve the character of the district or immovable in question.

Recent amendments of the Municipal Code and the **CTA** permit municipalities to implement any program to acquire immovables called for in a planning program involving their central sector or centre. They may also acquire, control and administer immovables; do required enhancement, restoration, demolition or excavation work; and alienate or lease them for the desired purpose.

C. Interim Building ByLaws

Municipalities in Quebec may not refuse to grant a building permit, unless a notice of motion to amend a land use bylaw has been issued. For a period not exceeding two months after such notice is given, no permit may be granted for work or utilization that will be prohibited in the zone if the bylaw is adopted. Quebec City, however, may adopt specific bylaws for this historic Old Quebec area, and its urban development commission has very extensive powers with respect to appearance and preservation of the city's heritage. In other provinces, the **British Columbia Municipal Act**, the Vancouver Charter, the **Manitoba Planning Act** and the **City of Winnipeg Act**, in particular, give this power to the municipalities.

D. Provincial Intervention

Under the **LUPDA**, the Minister of Municipal Affairs may act on behalf of a regional county municipality or a local municipality that fails to take action within the specified period or before the deadline established by the Act.

E. Variance

In some cases, land use bylaws may inadvertently create hardship for owners of buildings. In other provinces, boards of variance have the power to exempt these buildings from application of the bylaws, thus modifying the application of the bylaws in particular cases. Although Quebec is seriously studying proposals, it does not yet have mechanisms to permit variance from its land use bylaws. The only possibility at present is to amend the bylaws.

F. Enforcement

Binding Authority

The applicability of non-federal regulations, including municipal bylaws, to federal and federally-regulated works has been the subject of considerable jurisprudence; they may be applicable in certain limited circumstances.

Although the Quebec government, its departments and representatives must comply with the development plan and the interim control bylaw adopted by a regional country municipality, they are not bound by the planning programs or land use bylaws.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

No legislation exists binding current and future owners. It is possible to draft a contract, although not an easement or covenant, binding current and future owners. The contract can state that the owner will secure the signature of future buyers on the protective agreement. If future buyers refuse to sign then the owner will be liable in damages. This technique often succeeds in assuming that future buyers will respect the contract and thus in protecting a good number of properties for the forseeable future.

CHAPTER FOURTEEN

SASKATCHEWAN

1. PROVINCIAL LEVEL

Introduction

Protection at the provincial level occurs under the following Acts, the **Environmental Assessment Act** (1980) followed by overviews of the **Heritage Property Act** (1980); **Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act** (1978); and **Planning and Development Act** (1983). Effects of provincial designation relate to individual sites, surrounding sites and interim protection. Enforcement is through binding authority.

A. Environmental Impact Assessment

Historical resources can be protected via environmental impact assessment procedures which require inventory and investigation before government financed construction programs can proceed. The **Environmental Assessment Act** refers only indirectly to heritage property in its definition of environment. Thus an assessment of heritage impact is required only when an assessment is required for other reasons, i.e., ecological or when the Minister of Culture and Recreation specifically orders one. A soil disturbance usually results in an assessment aimed at archaeological resources.

B. Legislation

Three main statutes are relevant to heritage of older buildings: the **Heritage Property Act**; the **Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act**; and the **Planning and Development Act**.

i) Heritage Property Act (HPA)

The Minister of Culture and Recreation has the discretion to accept or reject construction, alteration or demolition of real property. Once a property is designated as heritage, any person has 30 days to object to the Minister. The issue is referred to the Saskatchewan Heritage Property Review Board for a public hearing. However, the Minister is not bound by the Board's decision; he must only consider it. Under the Act, furniture and other personal property can be designated. An Inventory of Historic Resources is maintained.

ii) Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act (PPPARSAA)

Aside from parks, this Act protects recreation sites, historic sites and protected areas. It is administered by the Department of Parks and Renewable Resources. An historic site is defined as "any building, structure, object or area that is significant in the history of culture of the province".

Only provincially-owned lands are eligible for designation as protected areas or recreation sites. However, no such restriction exists on the Cabinet's power to enact regulations protecting historic sites, whether designated or not.

iii) Planning and Development Act (PDA)

This Act has provisions whereby municipalities can adopt basic planning statements or development plans. Particularly, the broader scope development plans may contain information or provisions on heritage resources.

Subdivision Regulations under the Act state that the protection of significant historical features shall be considered when an approval authority is making a decision on whether or not to approve an application for subdivision approval.

C. Effects of Provincial Designation

i) Individual Sites

As mentioned previously, a site designated under the **HPA** cannot be changed without government permission. An area established as a protected area or an historic site within the meaning of the **PPPARSAA** is also protected by the Minister of Parks and Renewable Resources, as defined by Cabinet regulations.

ii) Surrounding Areas

Saskatchewan statutes do not give automatic protection to surroundings of designated sites. The **HPA** permits municipalities to designate both properties and areas or districts. However, the designation of provincial heritage property applies only to properties with no mention of areas or districts. But the Act's definition of property is broad enough to include both individual structures and areas. Under the **PPPARSAA**, an historic site may be an area, structure or object.

iii) Interim Protection

The **PPPARSAA** contains the provision that if a person undertaking work threatens any historic remains, the responsible Minister must be notified and the work delayed until the Minister investigates the sites. However, historic remains are never defined in the Act and thus have an open definition under expert testimony. Thus, the issuance of a demolition permit can be delayed until a required notice is given and a reasonable time elapsed.

Under the **HPA**, the Minister can call for an assessment to be submitted. Such protective measures have no time limit; thus construction or demolition permits can be suspended until the Minister is satisfied with the protective measures.

A third form of protection occurs when the Minister complies with the notice requirements of the Act; the property is immediately protected as if the designation had been complete.

D. Enforcement

Binding Authority

Provincial departments and agencies are bound by the **HPA**. Alternatively, the **PPPARSAA** does not state that the Crown is subject to the Act, and thus the Crown is not bound by this statute. These two Acts are binding on municipalities and non-government owners. This legislation does not apply to federal lands or to federally regulated land such as railway property.

2. MUNICIPAL LEVEL

Introduction

Municipal protection is discussed under planning, controlling demolition related to individual properties and areas, and controlling construction via development control and use zoning. Interim control is by means of controlling demolition, construction and provincial intervention. Variances and enforcement conclude this section.

A. Planning

There is no obligation for municipalities to include heritage in the planning process. The **PDA** does not specify preservation of historic sites and districts as a component of municipal planning. However, the **HPA** does confer powers on municipalities for the protection of historic sites and other structures; and empowers municipalities to define areas to be examined for future designation as a heritage conservation district. This exercise can lead to a development plan of which a major feature is protective measures.

A municipality will normally undertake preparation of a development plan or basic planning statement, or in combination with other municipalities, a district development plan on its own initiative. Under the **PDA**, a development plan or basic planning statement is required in conjunction with a new zoning bylaw. After considering written submissions from interested parties who have had an opportunity of examining the plan, the council may adopt the plan and submit it for the Minister's approval. The plan takes effect upon such approval and thereafter it is binding upon the council and upon all persons, associations or other organizations including all departments and agencies of the provincial government and no development can be carried out that is contrary to the development plan.

Since the plan is binding on the council, it follows that bylaws passed contrary to it would be invalid. The plan itself must contain proposals for zoning controls which are consistent with it. The Minister who must approve zoning bylaws as well as plans, may refuse approval of a bylaw where he is of the opinion that it does not conform to the spirit and intent of the Act.

B. Controlling Demolition

The destruction of heritage by a municipality may be controlled partially through the provisions of the development plan as described above. Since the system of environmental impact assessment does not usually apply to heritage structures, unless specifically ordered by the Minister of Culture and Recreation, municipalities are normally under no obligation to file impact assessment reports when contemplating public works that might destroy heritage sites. The question of whether municipalities can prevent demolition of designated sites is discussed later.

i) Protection of Individual Properties

The **HPA** permits municipalities to designate Municipal Heritage Properties. The first step is for the municipal council to consult with the Municipal Heritage Advisory Committee. Such committees are optional.

A notice of intention is then issued by the council to the owner at least 30 days before the designating bylaw is passed. It must also be published twice, at specified intervals, in a local newspaper. It would appear that once the notice is served on the owner, the property enjoys interim protection from alteration and demolition for a period of 120 days. The owner can object to the Saskatchewan Heritage Property Advisory Board, and compel the Board to hold a public hearing. However, although the council considers the Board's conclusions, it is not bound by them.

The effect of a designating bylaw is as follows: "No owner of Municipal Heritage Property may apply to the council of the municipality in which the property is situated for approval to alter or demolish the property." Additionally, the Act states that "no person shall destroy, alter, restore, repair, disturb, add to, change or move, in whole or in part, any Municipal Heritage Property ... without the written approval of the council of the municipality."

The dissatisfied owner can object to the designation to the Saskatchewan Heritage Property Review Board at least three days before the bylaw is due to be discussed in council. Six months after the designation, he can ask the council to reconsider the designation; and if refused, he can again appeal to the Review Board. If the designation is not lifted, he can still continue to reapply at annual intervals. However, even if the municipality does not change its decision to designate, the owner has a further recourse. He can apply for a demolition permit, even on a designated property; alternatively, he can apply for a construction permit to alter the property. However, the owner cannot apply for a demolition permit until six months have elapsed from the date of designation. If the permit is refused, he can again appeal to the Review Board. If still unsuccessful, he can continue to apply for a demolition permit annually. In each case of reference to the Review Board, the Board acts only in an advisory capacity. Once it has submitted its report to the municipal council, the latter makes the final decision. This process becomes somewhat cumbersome.

ii) Protection of Areas

A municipality may protect an entire area by designating it as an heritage conservation district. The procedure is first to consult with the local advisory committee, if one exists. The council then passes a bylaw calling for an examination of the area. A development plan is prepared for the area, which must be put into effect. Once the plan is in effect, the municipality may designate the area as a heritage conservation district. This designation, however, requires further steps before it comes into effect. It must be submitted to a public hearing before the Saskatchewan Heritage Property Review Board; and in this case, the decision of the Board is not merely advisory, it is decisive.

Once the designation takes effect, "no person shall erect, demolish, remove or alter the external portions of any building or structure ... without a permit issued by the council." Although this applies only to exteriors, the municipality can extend its control to interiors if it alternatively designates a building as a Municipal Heritage Property. Where a building is a Municipal Heritage Property and would also otherwise fall within a heritage conservation district, the statutory provision pertaining to the former prevails.

C. Controlling Construction

i) General

The obvious way for a municipality to halt alteration of a heritage site or area is to designate it under the **HPA**. The controls on alteration appear to apply to new construction. The Act defines alteration as including change in any manner to the site in question, and new construction presumably falls into that category.

In Saskatchewan, as elsewhere in Canada, the general philosophy of land use controls is that the owner of land can do virtually anything with his property except as specifically prohibited by regulations; these are usually found in zoning bylaws. Under a development control system the situation is reversed, the owner can do virtually nothing unless specifically authorized.

ii) Development Control Under the PDA

Under this Act, there are new flexible zoning approaches. These include direct control districts, contract zoning, exceptions to development control and holding zones.

Interim development control may be imposed by a municipality in certain cases where the adoption of a plan or bylaw affecting the area in question is pending. Municipalities with no development plan, basic planning statement or zoning bylaw in effect and which are preparing a development plan or basic planning statement in conjunction with a zoning bylaw may pass an interim development control bylaw. Where there is an existing plan, statement or zoning bylaw in effect a council may adopt interim development control provided it is approved by either the Minister of Urban Affairs or Rural Development. Under interim control, a council may stipulate that all development must have its written permission.

The length of time interim control can stay in effect is limited to the time period prescribed for the preparation and adoption of a development plan and zoning bylaw or a basic planning statement and zoning bylaw. Sections 105 to 112 of the **PDA** outline the provisions for interim development control.

Also, a zoning bylaw may provide for a system of development and use permits and require that no development be undertaken without a development permit.

iii) Use Zoning

Municipalities are empowered to regulate property uses. The **PDA** also specifically provides for discretionary use zoning. Decisions on discretionary uses must conform to general development standards included in the zoning bylaw respecting the discretionary use. Applications for the approval of a discretionary use are made to the municipality and are decided upon by council.

D. Interim Control

i) Control of Demolition

A delay can occur between when a municipality takes action on a heritage issue and when such action takes effect. To delay a demolition permit, first the mayor or reeve can issue a temporary stop order for any activity which he considers prejudicial to heritage in the municipality. This order can last

60 days, and is appealable to the Court of Queen's Bench. Secondly, the council can pass a bylaw providing 60-day interim protection by denying a construction or demolition permit for any property which might, in its opinion, be eligible for designation. Thirdly, the property is protected for a 120-day period after the municipality notifies the owner of its intent to consider designation.

ii) Control of Construction

The interim controls on demolition described above also apply to alterations and new construction under the **HPA**. Further protection may exist under the **PDA** in those cases where municipalities are authorized to use interim development control. Municipalities with an existing zoning bylaw, plan or basic planning statement may only adopt interim development control where special conditions warrant it and only with ministerial approval.

iii) Provincial Intervention

In several provinces, the central planning authority or the responsible minister is empowered to compel the council to adopt plans and bylaws or to conform to and enforce plans and bylaws that have already been adopted where there has been a failure to do so. In Saskatchewan, such power belongs to the Ministers of Urban Affairs and Rural Development under the **PDA**. If the Minister is satisfied that a municipality under his jurisdiction needs a plan or plan amendment he can compel it to draft one.

E. Variances

Even the most stringent land use controls will not necessarily cause hardship to owners of property for which the controls are inappropriate. A development appeals board is empowered to vary the application of zoning controls to a property where they would result in practical difficulties or unnecessary hardships. The board's decision can be appealed to the Provincial Planning Appeals Board, whose decision is final. The appeal mechanism for designations under the **HPA** was described earlier.

F. Enforcement

Binding Authority

As previously mentioned, the applicability of non-federal regulations, including municipal bylaws, to federal and federally-related works has been the object of considerable jurisprudence. They may be applicable in certain limited circumstances.

The provincial government and its agencies are bound by development plans, basic planning statements, zoning bylaws and other provisions and regulations of the **PDA** and bound by the heritage designation under the **HPA**. However, under the **PDA**, there are provisions for exemptions to the provisions of that Act for public works where the Lieutenant-Governor in Council considers it in the public interest. Furthermore, zoning bylaws, like development plans and basic planning statements, must be approved by the Minister; thus the province has notice of such bylaws and an opportunity to protect provincial interests.

In the case of development plans, municipal public works must respect the terms of the plan. Similarly zoning bylaws must conform to any basic planning statement or plan in force.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

The **HPA** empowers the Minister of Culture and Recreation, the local municipality and organizations approved by the Minister to sign restrictive covenants when the covenant's purpose is the protection of heritage property.

CHAPTER FIFTEEN

YUKON TERRITORY

1. TERRITORIAL PROTECTION OF PROPERTY

Introduction

Heritage oriented legislation in Yukon is the 1971 **Area Development Ordinance** (ADO) and effects of designation under this Ordinance are protection of individual sites, surroundings of sites, effects on areas and interim protection. Enforcement is related to inspection and binding authority. The draft Heritage Resources Policy is identified.

A. Environmental Impact Assessment

There is no statute or ordinance specifically dealing with projects threatening existing buildings or providing a public forum to oppose such threats.

B. Legislation

i) ADO

This is not strictly a heritage statute. The Commissioner in Executive Council may adopt regulations to prohibit the erection, maintenance, alteration, repair or removal of buildings. An order to designate a development area would follow.

C. Effects of Designations under the ADO

i) Protection of Individual Sites

In Yukon, the Territorial Commissioner is empowered to designate certain areas in which alteration or demolition is prohibited unless governmental consent is obtained. The word area is not defined in the **ADO**; it can presumably be as large or as small as the Commissioner chooses. However, a discussion of the **ADO** for heritage conservation purposes is relatively theoretical since it has never been used specifically for that purpose. Building preservation by the Yukon Government include buildings in Herschel Island, Fort Selkirk and Lower Laberge.

ii) Surroundings of Sites

The **ADO** does not give automatic protection to the surroundings of designated sites. Thus neighbouring construction can block all views of the heritage site. To protect vistas, it would be necessary to include them in the designation order.

iii) Effect on Areas

Entire areas are not protected under the **ADO**. The Commissioner can designate such areas as a protected development area or site.

iv) Interim Protection

The **ADO** does not include a provision to maintain the status quo pending governmental decision on whether or not to designate.

D. Enforcement

Inspection and Binding Authority

The **ADO** does not include a provision authorizing inspection of designated areas and is not binding on heritage owners. It does not apply to federal lands or federally regulated lands. Likewise, it does not apply to the Crown, Territorial government. Thus heritage sites are not protected against Territorial works. Preservation projects by Parks Canada include Robert Service's cabin and the large dredges of Bonanza Creek.

E. Heritage Resources Policy

A draft policy has been developed by the Department of Economic Development and Tourism/Renewable Resources for the protection and management of Yukon's heritage resources. A Yukon Heritage Advisory Board will be established. The final policy has not yet been put in place.

2. MUNICIPAL LEVEL

Introduction

Municipal planning is conducted under the **Municipal Act** (1980). Controlling demolition is via interim control, variances and binding authority.

Municipal powers respecting controls on demolition, alteration and construction are contained in the **Municipal Act**.

A. Planning

i) General

Provision is made in the **Municipal Act** for municipalities to deal with heritage matters, but there is no obligation for municipalities to include heritage conservation in their planning process. In Whitehorse, preservation of the Donnenworth House and the Smith House are due to the efforts of the Yukon Historical and Museums Association, Canada Development, Yukon Tourist Incentives and Finning Tractor Limited.

ii) Effects of Planning

A municipal council is to adopt an official community plan within two years of its corporation, but the Minister may grant a time extension if it is required.

B. Controlling Demolition

Municipalities have the power to halt or delay demolition in accordance with the provision of their building standards bylaw.

i) Interim Control

Municipalities in Yukon are not empowered to refuse issue of a building permit pending adoption of a bylaw in the absence of any existing bylaw. The Minister, however, must approve every zoning bylaw.

ii) Variances

Municipalities are empowered to establish a board of variance. Decisions of such a board are subject to appeal to the Yukon Municipal Board.

iii) Binding Authority

The **Municipal Act** states that the governments of Canada and Yukon and any agency thereof, shall not carry out any development contrary to or at variance with a zoning bylaw.

3. PRIVATE LEVEL

Easements and Restrictive Covenants

Statutory Reform

No legislation exists binding current and future owners. It is possible to draft a contract, although not an easement or covenant, binding current and future owners. The contract can state that the owner will secure the signature of future buyers on the protective agreement. If future buyers refuse to sign then the owner will be liable in damages. This technique often succeeds in assuring that future buyers will respect the contract and thus in protecting a good number of properties for the foreseeable future.

CONCLUSION

As Canadians become more and more aware of the heritage values of buildings, sites and areas, the desire to conserve this heritage creates a land use planning issue which can set the forces of preservation against the wishes and desires of landowners and developers. Most provinces are attempting to address this issue through some form of heritage legislation, although only two provinces, Alberta and British Columbia involve themselves in compensating designated landowners.

Canada has over seven million buildings, but heritage planning is focused on only 0.1% of the building stock or some 7 000 buildings. These are buildings which currently receive some level of protection under Canadian legislation.

At present, in order to preserve a property/building, the onus is primarily on those who wish to protect the site to show that the property deserves protection, not on those who would develop it to show that it is expendable. Current laws and long standing customs protect the right of a proprietor to dispense of a property with only certain limitations. The issues are the addition of heritage as a limitation, and the immediate question of compensation or who pays for the preservation? Additional legal factors promoting heritage are the tax incentives for demolition. Similar tax incentives are unavailable for renovation. If they were, there would be some incentive for preservation or there would be even more if the demolition incentives were removed for properties designated under heritage legislation.

Because heritage planning is relatively recent in the area of land use planning, it is hoped that this present compendium of the status of heritage legislation will help make the activities across Canada better known and that jurisdictions can learn from each other.

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APPENDIX A

POLICY ON FEDERAL HERITAGE BUILDINGS

A. Policy Statements

i) Canada's real property will be managed to provide for and encourage the conservation and continued use of heritage buildings.

ii) The degree of protection afforded to federal heritage buildings will be commensurate with their architectural and design integrity, their landmark and urban setting value and their historic importance.

iii) The Government of Canada will encourage continuity of use and function for federally owned heritage buildings.

iv) The Government of Canada will explore all reasonable alternatives when the heritage character of a building is jeopardized.

B. Definitions

i) A Classified Building is a federal heritage building that has the highest heritage significance and which the owner department is directed to protect by this policy.

ii) A Recognized Building is a federal heritage building that has the second highest heritage significance and which the owner department is encouraged to protect by this policy.

iii) The Heritage Character of a federal heritage building is defined by the FHBRO when a building is designated as Classified or Recognized. Protective measures apply to the features which have been described as the heritage character. These features may range from the entire building envelope and its immediate surroundings to some very specific features such as doors, windows, or railings.

iv) A Significant Intervention means any alienation from federal ownership, rehabilitation, recycling, modification, repair or demolition which may affect the heritage character of a federal heritage building or a potential federal heritage building.

C. General Provisions

i) Federal heritage buildings will be evaluated and designated according to criteria and procedures approved by the FHBRO.

ii) Departments proposing to acquire or to dispose of a building 40 years old or older must obtain the advice of the Review Office regarding the degree of protection which the building may require.

iii) Owner departments shall maintain classified buildings so that their heritage character is not endangered. The Review Office shall have the authority to request and receive maintenance reports.

D. Identification, Evaluation and Designation

i) Departments will submit their potential federal heritage buidings to the Review Office for evaluation.

ii) The Review Office will evaluate the buildings and define their heritage character taking into account existing municipal and provincial evaluations and policies.

E. Significant Interventions

i) Departments planning repairs, demolition or disposal of a federal heritage building must first seek the advice of the Review Office.

ii) Together, the department and the Review Office will determine whether the planned action will affect the heritage character of the building. If so, the action is termed a significant intervention.

iii) If the building is Classified, the Review Office will assess the nature and extent of a significant intervention and will give firm direction to ensure its conservation.

iv) If the building is Recognized, the Review Office will assess the extent of a significant intervention and will offer expert advice to encourage its construction and continued use.

APPENDIX B

QUEBEC CULTURAL PROPERTY ACT

The aim of this Act is to protect Quebec's movable and immovable heritage property.

When the circumstances justify it and the property qualifies under the Act, an immovable (either a structure or a site) is granted a special heritage status. Although immovables can be "recognized" or "classified" by the Minister of Cultural Affairs, the designation of historic and natural districts is a Cabinet responsibility. Before a heritage status is granted or an order-in-council passed, the Minister shall obtain the advice of the Quebec Cultural Property Commission, which has 12 members and is responsible for providing expert advice to the Minister and hearing submissions from those interested in the cases. The Commission's opinions are not binding on either the Minister or the Cabinet.

An immovable is "recognized" mainly as a preventive measure. However, the "classified" and "district" statutes include the three basic aspects of heritage preservation: the structure or area is identified, is permanently protected, and the landowner is eligible for financial assistance from the government.

A. PROTECTION OF CULTURAL PROPERTY

Under the Act, the Minister is required to prepare an inventory of cultural property that might be recognized or classified.

In order to qualify for protection by the Minister, immovable cultural property must be either recognized or classified. In the case of land, an order-in-council must be passed, making it an historic or natural district.

1. Archaeological Property and Sites

An exception to the above rule is provided in the Act's sections on archaeological property and sites, giving the Minister and the Cabinet emergency powers in cases where archaeological property and sites are threatened, but are neither recognized nor classified. Moreover, no archaeological digs or surveys may be carried out without a permit from the Minister, who shall obtain the advice of the Cultural Property Commission. The Act also requires holders of such permits to submit an annual report of their activities. Finally, anyone discovering archaeological property or sites must notify the Minister without delay.

Generally speaking, archaeological property and sites in Quebec belong to the owner of the land on which they were found. However, a provision in the Act stipulates that any alienation of public lands after July 8, 1972 is subject to a full ownership reservation in favour of the Crown, in cases where archaeological property and sites are located on these lands.

2 (a) Recognized and Classified Cultural Property

Recognized or classified cultural property may not be removed from Quebec without authorization from the Minister, who shall obtain the advice of the Commission. Moreover, if this property is over 50 years old, it may not be sold without an indication by the Minister of whether he intends to exercise his right of pre-emption under the Act. Regardless of the age of the recognized or classified cultural property, alienation must always be preceded by at least 60 days notice on the part of the owner or the Minister.

(b) Specific Rules Governing Recognized Cultural Property

No permission is required under the **Cultural Property Act** to destroy, alter, restore, repair or modify recognized cultural property in any way. The owner need only send a notice of intention, at least 60 days in advance, to the Minister, and a copy of that notice to the clerk or secretary-treasurer of the municipality in which the cultural property is located.

(c) Specific Rules Governing Classified Cultural Property

All classified cultural property must be maintained in good condition.

Classified cultural property may not be destroyed, altered, damaged, restored, repaired, modified or used as a backing for construction without authorization from the Minister in consultation with the Commission. This authorization does not exempt the owner from complying with the other acts and regulations that apply to the immovable. An exception to the above rule is the case of classified historic sites, which are small areas governed by the controls in force in the district, even though the site legally constitutes cultural property in itself.

Under the Act, cultural property classified as an historic monument must be surrounded by a protective area extending 152 metres from the property in question. If the requirements have been met with respect to the owners of immovables or parts of immovables in the protected area, the same rule applies as for historic or natural districts.

No classified property may be alienated without authorization from the Minister, who shall obtain the advice of the Commission.

Any classified immovable cultural property not used for commercial purposes is exempt from property taxes, subject to the conditions established by government regulations, for up to half the value listed in the valuation roll of the municipality in which it is located.

3. Immovables in an Historic or Natural District

In an historic or natural district, no one shall divide, subdivide or parcel out a lot, or change the arrangement, ground plan, destination or utilization of an immovable, or make any construction, alteration or demolition involving, in particular, the dimensions, architecture, materials or exterior appearance of an immovable, without previous authorization of the Minister, who shall obtain the advice of the Commission.

Moreover, signs or billboards shall not be posted, altered and demolished in an historic or natural district, without prior authorization from the Minister, who shall obtain the advice of the Commission. Such authorization does not exempt the owner from complying with the other Acts and Regulations that apply in the district where the property is located.

B. FINANCIAL ASSISTANCE FROM THE MINISTER

The Minister provides financial assistance for the maintenance, restoration, alteration or transport of classified cultural property, or property located on a classified historic site or in a historic or natural district. The Act also authorizes the Minister to provide grants for the preservation and enhancement of cultural property and property located in historic or natural districts, on classified historic sites or in protected areas.

C. THE MUNICIPALITY'S ROLE IN APPLYING THE CULTURAL PROPERTY ACT

The protection of heritage immovables inevitably brings into question the territorial interests of the municipality, whose elected representatives are primarily responsible for development and urban planning. In all its heritage protection activities, the Department of Cultural Affairs (DCA) is very careful to take into account the views of the municipal administration concerned and, where appropriate, involve the municipal administration, one of its representatives or a representative group in the cultural identification of heritage property. This is the reason that, for example, the final phase of a heritage conservation activity - the interpretation of a historic monument, a classified historic or archaeological site - may be carried out locally under a financial assistance program budgeted by the Department specifically for that purpose.

The municipality's contribution may take various other forms as well, depending on the circumstances of the case.

- Since 1978, the DCA had concluded over 30 heritage development agreements with municipalities. Most of these agreements deal with improvements to municipal land use bylaws, the establishment of development programs and the implementation of specific projects. The agreements cover the majority of Quebec's nine historic districts and a number of sites with a high proportion of heritage structures. This mechanism enables the Department to work with the municipalities through coordinated, joint and complementary activities. It is not a unilateral government approach, but rather provides for negotiation and agreement on objectives, means and

- shared costs. The agreement mechanisms are thus completely in line with the basic principles of the **Land Use Planning and Development Act**, with respect to political responsibility for development, coordination among the various levels of authority, coordination of decisions, participation and consultation.

- Even in areas not specifically covered by the **Cultural Property Act**, the Department has undertaken to make municipalities aware of the importance of good land use bylaws, designed to promote heritage immovables as a major aspect of the visual environment. The Department has provided technical and financial assistance, in particular to help municipalities amend their bylaws on protected areas, classified historic sites and historic and natural districts, so that these bylaws can be approved by the Minister under section 49 of the Act. Once this approval is obtained, departmental authorization in protected areas is no longer required because the municipality has full authority to issue permits. This authority is, of course, subject to any other applicable statutes or bylaws.

- There are very many cases in which municipal authorities have acquired and brought under their own jurisdiction a heritage immovable that warrants protection and enhancement because of its architecture or use. Where an immovable is classified or located in an historic or natural district, the municipality's restoration costs may be significantly offset by a grant from the Minister.

- Article 392f(1) of the Municipal Code and section 412.50 of the **Cities and Towns Act** authorize municipal councils to prohibit, for up to 12 months after the notice of motion, demolition of any immovable that is or might be cultural property under the **Cultural Property Act** or that is located on land that might be a historic or natural district under that Act. The 12-month period is provided so that the Minister can decide on the council's request for the Minister to apply one of the protective mechanisms under the **Cultural Property Act**. The power granted to the municipal council under these provisions is a sort of interim control, pending the Minister's decision.

APPENDIX C

SELECTED FEDERAL - PROVINCIAL - TERRITORIAL GOVERNMENT AGENCIES

Federal

- Secretary
  Historic Sites and Monuments Board of Canada
  Department of the Environment
  Parks Canada
  Ottawa, Ontario K1A 1G2
  (819) 994-1808

Alberta

- Department of Culture
  Assistant Deputy Minister
  Historical Resources Division
  Old St. Stephen's College
  8820 - 112 Street
  Edmonton T6G 2P8
  (403) 427-2355

  Director
  Historic Sites Service
  (403) 427-2022

  Director
  Archaeological Survey of Alberta
  (403) 427-2355

- Chairman
  Alberta Cultural Heritage Foundation
  Room 202, 9924 - 106 Street
  Edmonton T5K 1C4
  (403) 425-3486

- Alberta Historical Resources Foundation
  121 - 102 8th Avenue S.E.
  Calgary T2G 0K6
  (403) 297-7320

British Columbia

- Director
  Heritage Conservation Branch
  Ministry of Provincial Secretary and Government Services
  Parliament Buildings
  Victoria V8V 1X4
  (604) 387-1205

- Chairman
  British Columbia Heritage Trust
  c/o Ministry of Provincial Secretary and Government Services
  Parliament Buildings
  Victoria V8V 1X4
  (604) 387-1077

Manitoba

- Director of Historic Resources
  Department of Culture, Heritage and Recreation
  2nd Floor, 177 Lombard Avenue
  Winnipeg R3B 0W5
  (204) 945-4389

- Director
  Historic Sites Advisory Board
  3rd Floor, 177 Lombard Avenue
  Winnipeg R3C 0W5
  (204) 945-4605

- Historic Projects Coordinator
  City of Winnipeg
  Department of Environmental Planning
  395 Main Street
  Winnipeg R3B 3E1
  (204) 985-5390

- Director of Parks
  Department of Natural Resources
  Parks Branch
  280 Smith Street
  Winnipeg R3C 1T5
  (204) 945-4362

- Director
  Cultural and Heritage Initiatives
  Department of Business Development and Tourism
  155 Carlton Street
  Winnipeg R3C 3H8
  (204) 945-3970

- Director
  Provincial Planning Branch
  Department of Municipal Affairs
  405 Broadway Avenue
  Winnipeg R3C 3L6
  (204) 945-2595

- Director
  Urban Policy Coordination Branch
  Department of Urban Affairs
  509 - 386 Broadway Avenue
  Winnipeg R3C 3R6
  (204) 945-3618

New Brunswick

- Director of Historic Sites
  Department of Tourism, Recreation and Heritage
  P.O. Box 6000
  Fredericton E3B 5H1
  (506) 453-2324

- Director of Planning
  Department of Municipal Affairs and Environment
  4th Floor, Carleton Place
  P.O. Box 6000
  Fredericton E3B 5H1
  (506) 453-2171

Newfoundland and Labrador

- Director
  Historic Resources Division
  Department of Culture, Recreation and Youth
  Newfoundland Museum, Duckworth St.,
  St. John's A1C 1G9
  (709) 576-2462

- Director
  Urban and Rural Planning
  Department of Municipal Affairs
  Confederation Building
  St. John's A1C 5T7
  (709) 576-3090

Northwest Territories

- Prince of Wales Northern Heritage Centre
  Department of Justice and Public Services
  P.O. Box 1320
  Yellowknife X1A 2L9
  (403) 873-7685

- Chief
  Municipal Affairs Division
  Department of Local Government
  P.O. Box 1320
  Yellowknife X1A 2L9
  (403) 873-7329

Nova Scotia

- Head of Heritage Unit
  Department of Culture, Recreation and Fitness
  Terminal Building, 8th Floor
  P.O. Box 864
  Halifax B3J 2V2
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Nova Scotia

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  Department of Municipal Affairs
  Maritime Centre, 13th Floor
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- Director
  Department of Education
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Ontario

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  Culture Division
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  Ministry of Citizenship and Culture
  77 Bloor Street West
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- Chairman
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- Director
  Community Renewal Branch
  Community Planning Programs Division
  Ministry of Municipal Affairs
  777 Bay Street
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- Executive Director
  Property Management Division
  Ministry of Government Services
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Prince Edward Island

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Quebec

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- Director General
  Municipal Relations
  Ministry of Municipal Affairs
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Saskatchewan

- Director
  Heritage Conservation Division
  Department of Culture and Recreation
  1942 Hamilton Street
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- Saskatchewan Heritage Advisory Board
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  Heritage Conservation Division
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  (306) 787-2809

- Director
  Saskatchewan Heritage Property Review Board
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  Heritage Conservation Division
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Saskatchewan

- Director
  Community Planning Services Branch
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  3085 Albert Street
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  (306) 787-2732

- Executive Director
  Community Planning Services Branch
  Department of Urban Affairs
  2151 Scarth Street
  Regina S4P 3V7
  (306) 787-2268

Yukon Territory

- Director
  Heritage Branch
  Department of Economic Development and Tourism
  Box 2703
  Whitehorse Y1A 2C6
  (403) 667-5363

- Director
  Community Services
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